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No. 10791

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

DANIEL P. WHITE, an individual doing business as
GLOBE FREIGHT SERVICE,

Appellant,

vs.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, a corporation,

Appellee,

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

AUG - 3 1944

PAUL P. O'BRIEN,
CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

For Appellants:

F. W. TURCOTTE,
1004 Builders Exchange Bldg.,
656 S. Los Angeles St.,
Los Angeles, Calif.

For Appellee:

JONATHAN C. GIBSON,
M. W. REED,
L. W. BUTTERFIELD,
WILLIAM F. BROOKS,
448 Kerckhoff Bldg.,
Los Angeles, Calif. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States
for the Southern District of California

Central Division

No. 2384-BH Civil

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, a corporation,

Plaintiff and Appellee,

vs.

DANIEL P. WHITE, an individual doing business as
GLOBE FREIGHT SERVICE,

Defendant and Appellant.

AGREED STATEMENT OF CASE ON APPEAL,
PURSUANT TO RULE 76 OF THE FEDERAL
RULES OF CIVIL PROCEDURE.

Pursuant to the terms of Rule 76, the parties hereto, believing questions presented by the appeal herein of Daniel P. White, an individual doing business as Globe Freight Service, from the judgment rendered by the trial court in this cause on the 18th day of June, 1943, can be determined by the United States Circuit Court of Appeals for the Ninth Circuit, to which said appeal has been taken, without an examination of all of the pleadings and evidence, present this statement of the case, showing how the differences arise and setting forth such facts as proved or sought to be proved as are deemed essential to a decision of such questions by said United States Circuit Court of Appeals for the Ninth Circuit as follows:

The Atchison, Topeka and Santa Fe Railway Company, the plaintiff and appellee, is a corporation created, organized and existing under the laws of the State of Kansas, engaged in the transportation of freight as a common [2] carrier by railroad subject to Part I of the Interstate Commerce Act between, among other places, the station of Los Angeles in the Southern District of California, and the station of Chicago, Illinois; that at said station of Chicago, Illinois, as well as at other stations on its line, plaintiff and appellee's line of railway connects with other railroad lines, all of which are common carriers of property by railroad subject to Part I of the Interstate Commerce Act and all of which operate lines of railway from said points of connection to the stations of South Bend, Indiana; Indianapolis, Indiana; Canton, Ohio; Cleveland, Ohio; Detroit, Michigan; and Essington, Pennsylvania.

That plaintiff and appellee and all of its connecting rail lines operated and now operate under tariffs lawfully on file with the Interstate Commerce Commission, pursuant to Part I of the Interstate Commerce Act, and not otherwise.

Continuously since April, 1937, defendant and appellant, Daniel P. White, doing business as Globe Freight Service, has conducted a freight forwarding business. He was and is engaged in the undertaking of collecting at his terminal at Los Angeles parcels of freight from various shippers throughout Southern California and consolidating the same into carload lots, and then shipping such carload quantities to his other terminals where they are distributed

locally in smaller lots; the defendant and appellant engages the services of railroad carriers to perform the actual transportation between the terminal centers. He maintains terminals at Los Angeles, California; Chicago, Illinois, Cincinnati and Cleveland, Ohio; Detroit, Michigan; Milwaukee, Wisconsin; and New York. New York. Through solicitation and advertising he holds out to the public a complete service of transportation of small shipments of various commodities. He accepts freight for transportation from store door to store door, issuing a bill of lading in his name covering the through movement and assuming responsibility for the safe delivery of the goods. He publishes tariffs naming through rates which are collected on his billing from shippers and consignees. Shipments are transported from points of origin to his concentration terminal at Los Angeles by motor carriers whose services are engaged by him. [3]

I.

Exhibit "A", hereby referred to and made a part hereof, consists of photostatic copies of the following original documents covering the shipment made January 6, 1940 (24th cause of action):

1. Original shipping order, being a carbon copy of the original bill of lading which was retained by defendant and appellant;
2. Waybill for car ATSF 135668;
3. Waybill for car NKP 22415;
4. Destination station record of freight bill;

5. Los Angeles record of prepaid freight receipt (original retained by shipper);
6. Los Angeles prepaid only waybill;
7. Prepaid and undercharge freight bill submitted to defendant and appellant at Los Angeles, California;
8. Title page of Trans-Continental Freight Bureau Eastbound Tariff No. 3 series, I. C. C. No. 1431;
9. Page 131 of the tariff referred to in sub-division 8 of this paragraph showing Item 503 entitled "Cars Furnished at Variance with Shipper's Order, at Carrier's Convenience";
10. Pages 241 and 242 of the tariff referred to in sub-division 8 of this paragraph showing Item 3060, which contains minimum carload weights and rates applicable on all shipments sued upon herein;
11. Title page of Consolidated Freight Classification No. 13;
12. Page 9 of the Freight Classification referred to in sub-division 11 of this paragraph, showing Rule 24.

The shipping documents, tariffs and rules comprising Exhibit "A" are typical of the shipping documents on the shipments which form the basis of causes of action 24, 29, 43, 46, 56, 59, 78 and 116 of the complaint, with the exception that nothing contained in Document No. 7 of Exhibit "A" shall constitute an admission by the defendant and appellant that he has ever appropriated (as the term is used in the transportation industry) any car which is involved in the causes of action hereinabove specifically mentioned. [4]

II.

Exhibit "B", hereby referred to and made a part hereof, consists of photostatic copies of shipping documents covering the shipment made on October 5, 1940 (79th cause of action) which are similar to those referred to in paragraph I hereof. The shipping documents, tariffs and rules comprising Exhibit "B" are typical of the shipping documents which formed the basis of all of the causes of action of the complaint other than those of which Exhibit "A" is typical, as set forth in paragraph I hereof, with the following exceptions:

(a) That with respect to causes of action 8, 13, 17, 19, 21, 27, 28, 30, 31, 34, 41, 42, 43, 44, 45, 54, 56, 69, 78, 82, 83, 85, 91, 98, 108 and 116, the records of plaintiff and appellee included car orders placed by defendant and appellant; that of the total of twenty-six car orders, ten were for one 40-foot car, nine were for two 40-foot cars, and seven were for one 50-foot car; that two 40-foot cars were used by defendant and appellant in making each of the shipments covered by car orders.

(b) That the shipping order which is Document No. 1 of Exhibit "B" is not typical to the extent that it indicates unloading of one of the cars involved took place at more than one point in the City of Chicago, whereas, a typical shipment in the several causes of action of the complaint, of which Exhibit "B" is otherwise typical, involved the transportation of freight from one point of loading at Los Angeles, California, to one point of unloading at Chicago, Illinois.

(c) That nothing contained in Document No. 7 of Exhibit "B" shall constitute an admission by the defendant and appellant that it has ever appropriated (as that term is used in the transportation industry) any car which is involved in any of the causes of action of the complaint.

III.

The original bills of lading covering all of the shipments sued upon herein were prepared by the defendant and appellant and contain the notation to the effect that a 50-foot car was ordered by said defendant and appellant and two 40-foot cars were furnished at carrier's convenience. Said [5] original bills of lading were submitted to, signed and accepted by the plaintiff and appellee and then returned to the defendant and appellant. Exhibit "C", attached hereto and made a part hereof, is a photostatic copy of the original bill of lading covering the shipment involved in the 3rd cause of action. Said bill of lading is typical of all of the bills of lading covering the shipments involved in all other causes of action in the complaint.

IV.

Item 503 of Trans-Continental Freight Bureau East-bound Tariff No. 3 series, I. C. C. No. 1431, a photostatic copy of which is set forth as Document No. 9 of Exhibit "A", was in effect during all of the times mentioned in the complaint.

V.

All of the shipments sued upon and set forth in the 125 causes of action set forth in the complaint, consisted of

machinery, metal auto parts and miscellaneous commodities.

VI.

In each of the causes of action sued upon herein the rates and charges were collected under the applicable tariff upon the theory that one 50-foot car was ordered and two 40-foot cars were furnished and used at carrier's convenience. The freight charges as collected are the lawfully applicable charges under the tariffs in force on the dates of shipment if the defendant and appellant ordered one 50-foot car and was furnished two 40-foot cars at carrier's convenience, in compliance with the tariff rules and regulations covering the substitution of two smaller cars for one larger car ordered.

VII.

All shipments involved herein were made by defendant and appellant in the ordinary usual course of the operation of his business as a freight forwarder.

VIII.

Prior to the making of the shipments involved it was agreed and understood by and between plaintiff and appellee on one hand, and defendant and [6] appellant on the other hand, that defendant and appellant preferred and desired the use of two 40-foot cars instead of one 50-foot car and that the plaintiff and appellee did furnish the defendant and appellant two 40-foot cars in lieu of a 50-foot car and assessed the charges on the basis of a 50-foot car being ordered and two 40-foot cars furnished at carrier's convenience.

The defendant and appellant made the shipments covered by the 125 causes of action set forth in the complaint, and paid the freight charges therefor in the manner set forth in the findings of fact which have been designated as part of the record on appeal herein.

IX.

It was not for the convenience of the plaintiff and appellee to furnish two 40-foot cars in lieu of a 50-foot car and the two 40-foot cars were not furnished for the carrier's convenience, but were so furnished to the defendant and appellant under and pursuant to the prior understanding and agreement between the parties hereinabove referred to.

X.

The plaintiff and appellee was not and is not a common carrier by motor vehicle, subject to Part II of the Interstate Commerce Act, and none of the shipments involved herein moved partly by rail and partly by motor truck, and none of said shipments moved under any joint rates between a common carrier by railroad and a common carrier by motor truck, or under any rates of a common carrier by motor truck.

Defendant and appellant is not a common carrier by motor truck and did not at any time during the period involved in this action maintain any joint rates with the railroad line of plaintiff and appellee or with any other common carrier by railroad or with any common carrier by motor truck, subject to Part II of the Interstate Commerce Act.

XI.

That during the period involved herein the plaintiff and appellee did not maintain or publish any joint rates with any freight forwarder and did not at any such time participate in or become a party to any freight forwarder tariff and no freight forwarder was a party to any tariff publication published [7] or maintained by it.

XII.

At the conclusion of the trial in the United States District Court in and for the Southern District of California, Central Division, the Court rendered its opinion in writing, copy of which is attached hereto, marked Exhibit "D" and hereby made a part hereof.

XIII.

Thereafter the trial court made its findings of fact and conclusions of law, hereto attached, marked Exhibit "E" and hereby made a part hereof.

XIV.

Thereafter on June 18, 1943, the trial court entered its judgment in favor of the plaintiff and appellee, against the defendant and appellant, copy of which is hereto attached, marked Exhibit "F" and hereby made a part hereof.

XV.

Within the period allowed by law after the entry of said judgment, the defendant and appellant made a motion for a new trial, which motion for a new trial was denied by the trial court on the 28th day of December, 1943.

XVI.

On March 20, 1944, and within 90 days after the denial of defendant and appellant's motion for a new trial, the defendant and appellant served on the plaintiff and appellee notice of appeal, copy of which is hereto attached, marked Exhibit "G" and hereby made a part hereof.

XVII.

On the 25th day of March, 1944, pursuant to an order of the trial court, the defendant and appellant filed with the Clerk of the United States District Court for the Southern District of California, Central Division a Civil Undertaking on Appeal in the sum of \$250.00.

XVIII.

On the 25th day of April, 1944, the defendant and appellant on one hand, and plaintiff and appellee on the other hand, entered into a stipulation, subject to the approval of the trial court, that the time within which the [8] transcript of record shall be filed in the United States Circuit Court of Appeals for the Ninth Circuit be extended to and including June 8, 1944, copy of which stipulation is attached hereto, marked Exhibit "H" and hereby made a part hereof. And on the same day the United States District Court for the Southern District of California, Central Division, duly made its order so extending the time within which the transcript of record shall be filed with the United States Circuit Court of Appeals for the Ninth Circuit to and including June 8, 1944, copy of which order is hereto attached, marked Exhibit "I" and hereby made a part hereof.

XIX.

It is stipulated and agreed that the sole questions presented by the defendant and appellant on his appeal to the United States Circuit Court of Appeals for the Ninth Circuit are (a) whether or not Section 419, Part IV of the Interstate Commerce Act should be held to bar recoveries by rail carriers of the alleged undercharges in connection with freight transported by the plaintiff and appellee and its connections for the defendant and appellant as a freight forwarder during the period from August 26, 1939, to February 11, 1941, both dates inclusive; and (b) whether or not Section 419 of Part IV of the Interstate Commerce Act grants immunity to freight forwarders for alleged undercharges via rail carrier for transportation performed by said rail carrier for the freight forwarder prior to May 15, 1942; and (c) whether or not Section 419 of Part IV of the Interstate Commerce Act bars the plaintiff and appellee from recovering the alleged undercharges.

XX.

It is further stipulated and agreed by the defendant and appellant on the one hand, and the plaintiff and appellee on the other hand, that the argument on motion for a new trial filed in the District Court by defendant and appellant herein, as well as an argument on motion for new trial filed in a similar action brought by the plaintiff and appellee against National Carloading Corporation, were made together on the same day, before the same Judge, and at that time counsel for National Carloading Corpora-

tion referred to Section 419 of Part IV of the Interstate Commerce Act as having a possible [9] bearing on the right of the plaintiff and appellee to maintain the suits for undercharges, but made no firm contention that said section was governing; but that otherwise, the questions now being presented for review by the United States Circuit Court of Appeals for the Ninth Circuit in paragraph numbered XIX hereof were not presented to the District Court for decision, and that the District Court made no specific findings of fact or conclusions of law with respect to said questions.

XXI.

It is further agreed and stipulated that the above is the material evidence in the case and that the facts as stated above may be regarded as true by the United States Circuit Court of Appeals for the Ninth Circuit, and this agreed case shall be taken and deemed by the Court as a part of the record in this case, without any statement of evidence.

Dated June 5, 1944.

F. W. Turcotte

Attorney for Defendant and Appellant.

JONATHAN C. GIBSON

WILLIAM F. BROOKS

Jonathan C. Gibson

By William F. Brooks

Attorneys for Plaintiff and Appellee.

Approved this 5 day of June, 1944, and ordered, when filed in the office of the clerk of this court, to supersede, for the purpose of the appeal herein, all parts of the record in this case other than said judgment appealed from, and further ordered to be copied, together with such judgment, and certified to the United States Circuit Court of Appeals for the Ninth Circuit as the record on the appeal herein.

Dated June 5, 1944.

Ben Harrison
District Judge. [10]

(Photostats.)



adopted by Carriers in Official, Southern, Western and Illinois

THIS SHIPPING ORDER

must be legibly filled in, in ink, in indelible pencil, or in carbon and retained by the Agent.

Shipper's No. LAC 403-40

The Atchison, Topeka and Santa Fe Railway Company
COAST LINES

Los Angeles Calif 175/40

19 From

Goods described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said goods are being forwarded throughout this contract as meaning any person or corporation in possession of the property under the contract) agree to carry to its usual place of destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed that each carrier of all or any of said goods, any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all laws and regulations by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

GLOBE FREIGHT SERVICE % Pennoyer (Merchandise Transfer Co 7424 POLK ST)

gnd to CHICAGO... ILLINOIS

ation Santa Fe all the way in TRAIN 138

ATSF 135668' - 121

ATSF 14th St Dely

NKP 22415 - 122

ing Carrier Car Initial Car No.

DESCRIPTION OF ARTICLES, SPECIAL MARKS AND EXCEPTIONS Weight (See 1st Section) Dimensions Rate Check Col

Carload Machinery & Auto Metal parts as described in Item 3060 & all items covered by item 3060, TCFB EB Tariff

0000 DETAILED LIST TO FOLLOW 0000

S L & C

ATSF 135668 & NKP 22415

1 50 foot car ordered; 2 smaller cars furnished by RR

(Signature of Consignor)

If charges are to be prepaid, write or stamp here "To be Prepaid."

very rush...do not delay

Received \$ If apply in payment of the charges on the property described herein.

SPECIAL BRACING & BLOCKING: DO NOT TRANSFER

Agent or Carrier

RUSH IN TRAIN 138

When goods are shipped between two ports by a carrier by water, the law requires that the bill of lading shall state whether the goods are to be delivered to the consignee or to the order of the consignee. If the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property. If the agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding...

GLOBE FREIGHT

Shipper

Post office address of shipper

Agent must sign this Shipping Order and must sign the Original in Los Angeles, CALIF.

EXHIBIT A

RECEIVED JAN 8 1940

2

HEAT 6 29 12521 Rev. 41H

Form 1826 Regular

30 THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY-COAST LINES 30

FREIGHT WAYBILL

To be Used for Single Consignments, Carload and Less Carload.

| | | | | | | | | | |
|--|--|---|--|---|--|--|--|---|--|
| CARRIER CAR AT <div style="border: 1px solid black; width: 100px; height: 30px; margin-top: 5px;"></div> | | WEIGHT IN YARDS Green Net <div style="border: 1px solid black; width: 100px; height: 30px; margin-top: 5px; text-align: center; font-size: 24px;">37 13</div> | | LENGTH OF CAR Ordered Furnished <div style="border: 1px solid black; width: 100px; height: 30px; margin-top: 5px;"></div> | | MARKED CAPACITY OF CAR Ordered Furnished <div style="border: 1px solid black; width: 100px; height: 30px; margin-top: 5px;"></div> | | Standard Weight of Car <div style="border: 1px solid black; width: 100px; height: 30px; margin-top: 5px;"></div> | |
| R INITIALS AND NUMBER AT&SF 135668 | | O. L. Transferred to or L. O. L. Loading No. <div style="border: 1px solid black; width: 100px; height: 30px; margin-top: 5px;"></div> | | DATE JAN 6 1940 | | WAYBILL No. AT&SF 121 | | | |
| STATION CHICAGO ILLS | | STATE O | | FROM RR 1241 LOS ANGELES CALIF | | STATION STATE | | | |
| SIGNED TO CHICAGO ILLS | | STATION O | | No. () FULL NAME OF SHIPPER and, for C. O. G. Shipments, the Street Address GLOBE FREIGHT SERVICE SHPRS LAC 403-404 | | | | | |
| CITY Show each Junction and Carrier in Route's Order to Destination of BOLEN AT&SF | | SHPRS | | Origin and Date, Original Car, Transfer From Bill and Precedent Waybill Numbers and Routing When Rebillated. <div style="text-align: right; font-size: 24px; margin-top: 20px;">3m</div> | | | | | |
| NAME AND ADDRESS GLOBE FREIGHT SERVICE C-O PEABODY MERCHANTS TRANSFER CO ESTIMATION AND ADDITIONAL ROUTING 742 W POLK ST ST. LOUIS MO SPECIFICATIONS (Regarding Lngs, Ventilation, Heating, Milling, Weighing, Etc. If load, Specify to Whom Being Shipped be Charged). <div style="text-align: right; font-size: 24px; margin-top: 20px;">3m</div> | | Show "A" if Agent's Routing or "B" if Shipper's Routing <div style="border: 1px solid black; width: 100px; height: 30px; margin-top: 5px;"></div> | | Santa Fe Date Weighed Car Weighed Uncoupled at Los Angeles Car Number Gross Tare Net | | | | | |
| TARE ALLOW | | GROSS TARE NET | | Trans-Continental Freight Bureau Weighing Dept. Scale Ticket No. m. Initials Date Weighed Car Weighed Uncoupled at Los Angeles Car Number Gross Tare Net Date of Tare Temp. Facts Car Owners Status Release Ice in Tanks Backs Blocking Damage | | | | | |

OX AND 1 CRTN RADIO PARTS NOS
OIL PET LUBR OIL
CRTN STEERING WHEELS
RATE ELECTRIC WASHING MACHINE
CRTNS WASHING MACHINE PARTS
LANCE MACHINERY AND METAL AUTO PARTS

INCLUDES HEIGHT AND CHARGES FOR NKP
15 WAYBILL AT&SF 122 ONE FIFTY FOOT CAR ORDERED
SMALLER CARS FURNISHED ACCOUNT CARRIERS CONVENIENCE

SPECIAL AGENT'S
 WORKING & LOCKING ON INT TRANSFER
 191-11-138

OUTBOUND JUNCTION STAMP AND INBOUND JUNCTION STAMP IN SPACE PROVIDED.

| First Junction | Second Junction | Third Junction | Fourth Junction | Destination Agent Will Stamp Here: Station Name and Date Received |
|----------------|-----------------|----------------|-----------------|---|
| | | | | |

Additional Junction Stamps and All Yard Stamps to be Placed on Back of Waybill

30 THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY—COAST LINES 30

22--The Atchison, Topeka and Santa Fe Railway Company--228 41

Agent's Consecutive No. 209

Date Issued Feb 27 1941

 SUPPLEMENTARY CORRECTION made at CHICAGO F. B. No. 1595 Jan 15 40
 entered in Cash Book 19 and in Station Freight Balance for FEB 27 1941 19

| | | | |
|--|----------------|--|--------------------|
| NAME OF RAILROAD MAKING WAYBILL Atchison, Topeka and Santa Fe Railway Company | | Date Jan 6 40 | Waybill No. 121 |
| To (Station) Chicago | (State) Ill | From Kansas City | (Station) Mo |
| Route (Show Each Junction and Carrier in Route Order) Chicago | | Shipper (Show Original Point of Shipment when Rebilled) Chicago | |
| CONSIGNEE AND DESTINATION (As Billed) Chicago | | CONSIGNEE AND DESTINATION (As Corrected) Chicago | |

WAYBILL READS PREVIOUS TO CORRECTION

MAR 7 1941

| ARTICLES | WEIGHT | RATE | FREIGHT | ADVANCES | PREPAID |
|----------|--------|------|---------|----------|---------|
| | 220 | 275 | 216 | | |
| | 56 1/4 | 175 | 275 | | |
| | | | 216 | | |

8 10 11 12

Mar 4 1941
MAR 1 1941
before Correc

WAYBILL READS AFTER CORRECTION

| ARTICLES | WEIGHT | RATE | FREIGHT | ADVANCES | PREPAID |
|----------|--------|------|---------|----------|---------|
| | 220 | 275 | 216 | | |
| | 56 1/4 | 175 | 275 | | |
| | | | 216 | | |

345 2 41

When a debit or credit is created by correction in advances and prepaid, supplementary correction will be listed twice on Form 309 or 305, once for the addition and again for the deduction in advances or prepaid as the case may be.

ADD

DEDUCT

Authority

 When the difference to be deducted is to be refunded to the consignee his receipt should be taken in this space:
 Received of THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

 \$4.00 Dollars (\$) In full payment of overcharge on freight bill No. 121
 RECEIPT. THE REFUND HAS BEEN ENDORSED BY AGENT ON THE ORIGINAL PAID FREIGHT

 Signature _____
 I hereby certify that the above charges are correct, that the Station Records have been corrected accordingly, and that REFUND HAS BEEN ENDORSED ON ORIGINAL PAID FREIGHT RECEIPT.

 *These lines to be used only in issuing agents of Foreign Roads about
 Advances in Advances and Prepaid

Refer to Instructions contained in Form 500.

Agent

J. M. ROY, Agent

10 20

30 THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY-COAST LINES 30

FREIGHT WAYBILL

To be Used for Single Consignments, Carload and Less Carload.

| | |
|---------------------------|------------|
| RED BAR | WEIGHT |
| Station Symbol and Number | Car Number |
| 591 | 972 |
| STOP AND CAR AT 2 | |

INITIALS AND NUMBER

NKP 22415

STATION

STATE

CHICAGO ILLS

STATION

STATE

ITY (Show each Junction and Carrier in Route, Order, to Destination of)

BELEN AT&SF

SHPRS

LINE AND ADDRESS

GLOBE FREIGHT SERVICE

C-O PENNOYER MERCHANTS TRANSFER CO

DESTINATION AND ADDITIONAL ROUTING

742 W POLK ST

C-O AT&SF 14TH ST DELIVERY

CTIONS (Regarding Long, Ventilation, Heating, Milling, Weighing, Etc. If load, Specify to Whom Being Charged).

C. L. Traffic Transfer Stamps to Be Shown in This Space

DESCRIPTION OF ARTICLES AND MARKS

C-L MACHINERY & AUTO METAL PARTS

NATION AGENT'S

LIGHT

1596

First Junction

AT&SF

Third Junction

Fourth Junction

Destination Agent Will Stamp

Station Station Name and

Date Received

JAN 16 1940

CHICAGO

30 THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY-COAST LINES 30

3

14

STATION RECORD

Form 1875-A Regular



Consignee
Destination
Route

GLOBE FRT SERVICE CAGE PENNY
742 M T 48500 N 25700
CHICAGO
JAN 15 1940
POINT OF ORIGIN TO DESTINATION

FREIGHT
BILL NO

19

2

The Atchison, Topeka and Santa Fe Railway Co.

| | | | |
|---------------------------------------|---|---|--|
| Way-Billed From LOS ANGELES | Way-Bill Date and No. JAN 6 40 AT | Full Name of Shipper GLOBE FRT SERV | Car Initials and No. AT 1-2668 |
| Original Point and Date of Shipment | Connecting Line Reference | Previous Way-Bill References SHIP L 1-202 404 | Original Car Initials and No. |

| NUMBER OF PACKAGES, ARTICLES AND MARKS | WEIGHT | RATE | FREIGHT | ADVANCES | TOTAL |
|---|--------|------|---------|----------|--------|
| 1 BOX & 1 CTN RADIO PTS | 70 | 400 | 280 | | |
| 1 PAIL PETROLEUM OIL | 25 | 340 | 85 | | |
| 1 CTN TANKING WHEELS | 15 | 200 | 60 | | |
| 1 CTN CASH MACHINE | 110 | 250 | 280 | | |
| 17 CTN CASH MACHINE PARTS CONSISTS OF GEAR PARTS MOTOR PARTS MACHINE PARTS | 700 | 178 | 1399 | | |
| BAL MACHINERY METAL AUTO PTS | 56154 | 178 | 99954 | | |
| INCLUDES W/CTN FOR RXP | 57160 | | 102169 | | 102169 |
| CHARGE TO THE CARRIER CANS FORM | | | | | |
| ACCT CARRIER CONV | | | | | |
| G 74200 T 48500 N 25700 | | | | | |

LOCATION
DELIVERY
BY

TOTAL TO COLLECT

STATION RECORD

Form 1875-A Regular



Consignee
Destination
Route

GLOBE FRT SERVICE CAGE PENNY
742 M T 48500 N 25700
CHICAGO
JAN 15 1940
POINT OF ORIGIN TO DESTINATION

Chicago,

19

2

The Atchison, Topeka and Santa Fe Railway Co.

| | | | |
|---------------------------------------|---|---|--|
| Way-Billed From LOS ANGELES | Way-Bill Date and No. JAN 6 1940 AT | Full Name of Shipper GLOBE FRT SERV | Car Initials and No. AT 1-2668 |
| Original Point and Date of Shipment | Connecting Line Reference | Previous Way-Bill References SHIP L 1-202 404 | Original Car Initials and No. |

| NUMBER OF PACKAGES, ARTICLES AND MARKS | WEIGHT | RATE | FREIGHT | ADVANCES | TOTAL |
|--|--------|------|---------|----------|-------|
| CTN MACHINERY AUTO METAL PARTS | | | | | |
| G 74200 T 48500 N 25700 | | | | | |
| Total Prepaid \$..... | | | | | |

LOCATION
DELIVERY
BY

(This is a copy of the freight bill and is not a receipt for transportation charges paid)

TOTAL TO COLLECT

15

4

Form 1881 Regular

PREPAID FREIGHT BILL

Santa Fe

JAN 17 40 CA
LOS ANGELES, CAL.

19

GLOBE FRT SERVICE

Via

FREIGHT } 3156 A
BILL No. }

To The Atchison, Topeka and Santa Fe Railway Company—Coast Lines, Dr.

| WAYBILL | | CAR | | FROM | | | CONSIGNEE AND DESTINATION | |
|---|-------------------|----------|---------------|-------------------|------|---------|-------------------------------|---------|
| DATE | NUMBER AND SERIES | INITIALS | NUMBER | LOS ANGELES, CAL. | | | GLOBE FRT SERVICE CHGO ILL | |
| JAN 17 | 40 AT | 306 | LA WT 121 JAN | 6 | 40 | | | |
| FOR FREIGHT AND CHARGES ON | | | | WEIGHT | RATE | FREIGHT | ADVANCES | TOTAL |
| MACHINERY & AUTO METAL PTS SHOULD READ | | | | 67160 | 178 | 119545 | | |
| 1 BX 1 CTN RADIO PTS NOS | | | | 70 | 404 | 283 | | |
| 1 PAIL LET LUBR OIL | | | | 25 | 340 | 85 | | |
| 1 CTN STEERING WHEELS | | | | 15 | 398 | 60 | | |
| 1 Crt ELEC WASH MACH | | | | 110 | 353 | 388 | | |
| BAL MACHRY MTL AUTO PARTS | | | | 56140 | 178 | 99954 | | |
| 17 CTNS WASH MACH PTS | | | | 786 | 353 | 2775 | | 103545 |
| INCLUDES WTC FOR MKP 22415 | | | | | | | | |
| RECEIVED PAYMENT | | | | | | | TOTAL | |
| | | | | | | | | |
| | | | | | | | | |
| | | | | Agent. | | | TOTAL TO COLLECT | 1035 45 |

(((COPY)))

This form of Freight Bill to be used by FORWARDING AGENTS, and only in cases where shipments are waybilled PREPAID.

16

30 The Atchison, Topeka and Santa Fe Railway Company—Coast Lines 30

PREPAID ONLY WAYBILL

INSTRUCTIONS GOVERNING THE USE OF THIS FORM.

Use this waybill only to transfer credits to another station as set forth in FORM 500, INSTRUCTIONS TO STATION FREIGHT AGENTS. Make a separate prepaid only waybill for each adjustment even where several adjustments are made on the same revenue waybill. Describe clearly each consignment adjusted and also where the revenue waybill contains more than one consignment, write the number of that consignment in the space "Full Name of Shipper, Etc." When reference to revenue waybill is not available, enter in the "Remarks" column any facts which will assist the receiving agent in finding the revenue waybill. If the receiving agent refunds the prepaid, receipt must be taken in space set aside therefor; if he applies the prepaid against an uncollected item he will fill out and sign the certificate hereon. When unable to refund the amount of the prepaid or to credit it to the station, enter the amount thereof in the "Freight" column of the prepaid only. Then report the Freight in the "Freight" column of Form 309 and the Prepaid in the "Prepaid" column of that form.

| | | | |
|---|-------|---|------------------------------|
| CAR INITIAL AND NUMBER (As Shown on Revenue Waybill) ATSEF 135668 AND NKP 22415 | | DATE JA 17 1940 | WAYBILL No. ATSEF 306 |
| STATION CHICAGO ILLS | STATE | FROM STATION LA 12141 LOS ANGELES CALIF | STATE |
| Transfer Credit Account LA | | Waybill No. 121 AND 168 | Freight Bill No. LA 12141 |

| NAME OF SHIPPER, POINT OF ORIGIN, CARRIER, BILLING, AND CONSIGNMENT NO. | | | | | | | ABOVE WAYBILL READS | | | | | |
|---|--|--|--|--|--|--|---------------------|--------|------|---------|----------|---------|
| | | | | | | | ARTICLES | WEIGHT | RATE | FREIGHT | ADVANCES | PREPAID |
| GLOBE FREIGHT SHPRS LAC 403-404 C-L AGGRIERY AND AUTO METAL ETC | | | | | | | | 67100 | 178 | 119545 | | |
| 135668 GROSS 74200 T 43500 N 25700 | | | | | | | | | | | | |
| P 22415 GROSS 82860 T 51400 N 31460 | | | | | | | | | | | | |

| CONSIGNEE AND DESTINATION | | ABOVE WAYBILL SHOULD READ | | | | | | |
|---------------------------|--|---------------------------|--------|------|---------|----------|---------|--|
| | | ARTICLES | WEIGHT | RATE | FREIGHT | ADVANCES | PREPAID | |
| GLOBE FRT SERVICE | | 1 BX 21 CRT RADIUMS | | | | | | |
| C-O PLUMBOYER | | 1 CRT | 70 | 404 | 283 | | | |
| MERCHANTS TRF CO | | 1 PAIR LET L'OR OIL | 25 | 340 | 85 | | | |
| 742 W POLK ST | | 1 CRT STEERING WHEELS | 15 | 398 | 60 | | | |
| AT 14TH ST DELV | | 1 CRT ELEC T. W. ST. MCH | 110 | 353 | 388 | | | |
| CHICAGO ILLS | | BAL AGGY & METAL | | | | | | |
| | | AUTO PARTS INCLUDES | | | | | | |
| W/C FOR | | NKP 22415 | 56154 | 178 | 999.54 | PAID | 1035.45 | |
| 17 CRTS WASHC MACH ETC | | | 786 | 353 | 27.75 | | | |

DO NOT REPORT ABOVE FIGURES ON FORM 309 OR 300.

| REMARKS | IN REPORTING USE PREPAID FIGURES SHOWN BELOW |
|---------|--|
| | Freight Bill No. 57160 |
| | FREIGHT PREPAID |
| | PPD ONLY 1035.45 |

| | |
|--|----|
| Received from and on shipment herein described. | 19 |
|--|----|

| CERTIFICATE | |
|---|---------------------------|
| I certify that I have applied the amount of the credit received on this Prepaid Only Waybill against my uncollected Freight Bill. | |
| Date Jan 19 1940 | Agent E. H. Gotschling |
| LOCAL FREIGHT OFFICE | |
| JAN 26 1940 CHICAGO | |

CONSIGNEE

FORM 1881 REGULAR

PREPAID FREIGHT BILL

Santa Fe

LOS ANGELES, CALIF., July 14 19 42

Globe Freight Service

VIA

FREIGHT BILL NO. AO-247

To The Atchison, Topeka and Santa Fe Railway Company Coast Lines, Dr.

| WAYBILL | | CAR | | FROM | CONSIGNEE AND DESTINATION | |
|--|-------------------|-----------|----------------|---------------------|---------------------------|-------------------------------|
| DATE | NUMBER AND SERIES | INITIALS | NUMBER | LOS ANGELES, CALIF. | | |
| 1-6-40 | AT 101 | AT NKP | 1-668 22415 | | Globe Frt Service | Chicago |
| FOR FREIGHT AND CHARGES ON | | | | WEIGHT | RATE | FREIGHT |
| Machinery and metal auto parts Lead car 3L460 as 2nd car Cars appropriated. Protect Rule 24 | | | | 40000 | | |
| | | | | 24794 | | |
| | | | | 64794 | 1 76 | 1153 33 |
| | | | | 1006 | No charge | 8 16 |
| | | | | | | 1161.47 |
| RECEIVED PAYMENT | | | | TOTAL | | 1161.47 1153.33 |
| | | | | Paid | | 1021 69 |
| AGENT. | | | | TOTAL TO COLLECT | | 139 80 |

This form of Freight Bill to be used by FORWARDING AGENTS, and only in cases where shipments are waybilled PREPAID.

18

7

This tariff will be released effective on or before June 30, 1940

C. T. C. No. 728
(Cancels C. T. C. No. 6707)

I. C. C. No. 1431
(Cancels I. C. C. No. 61413)

TRANS-CONTINENTAL FREIGHT BUREAU

(L. E. KIPP, Agent)

EAST-BOUND TARIFF No. 3-M

(Except portions under suspension
in I. & S. Dockets 4510 and 4532.)

(Cancels Tariff 3-L)

— NAMING —

LOCAL, JOINT, EXPORT, IMPORT AND PROPORTIONAL COMMODITY RATES

— FROM POINTS IN —

ARIZONA
CALIFORNIA

MEXICO
NEVADA

NEW MEXICO
OREGON

UTAH

(Referred to in Item 38)

— TO POINTS IN —

ALABAMA
ARKANSAS
CANADA
COLORADO
CONNECTICUT
DELAWARE
DISTRICT OF
COLUMBIA
FLORIDA
GEORGIA
ILLINOIS

INDIANA
IOWA
KANSAS
KENTUCKY
LOUISIANA
MAINE
MARYLAND
MASSACHUSETTS
MICHIGAN
MINNESOTA
MISSISSIPPI

MISSOURI
NEBRASKA
NEW HAMPSHIRE
NEW JERSEY
NEW MEXICO
NEW YORK
NORTH
CAROLINA
NORTH DAKOTA
OHIO
OKLAHOMA

PENNSYLVANIA
RHODE ISLAND
SOUTH CAROLINA
SOUTH DAKOTA
TENNESSEE
TEXAS
VERMONT
VIRGINIA
WEST VIRGINIA
WISCONSIN
WYOMING

(Referred to in Item 34)

GOVERNED, EXCEPT AS OTHERWISE PROVIDED HEREIN, BY WESTERN CLASSIFICATION No. 68 (I. C. C. No. 24 AND C. T. C.-W. C. No. 24 OF R. C. FYFE, AGENT) HEREINAFTER REFERRED TO AS CURRENT WESTERN CLASSIFICATION

ISSUED MAY 17, 1939

EFFECTIVE JUNE 30, 1939

(Except as otherwise provided herein)

Departure from the terms of Rule 9 (f) of Tariff Circular No. 20 is authorized under permission of the Interstate Commerce Commission No. 182847 of April 29, 1938.

ISSUED BY

L. E. KIPP, Agent, 516 W. Jackson Boulevard, Chicago, Ill.

(File 6-3-M)

GENERAL RULES

APPLICATION OF WESTERN CLASSIFICATION RULES

This tariff is governed by the "Rules" published in current Western Classification except as otherwise specifically provided in this tariff.

MINIMUM CARLOAD WEIGHTS

(This rule does not apply in connection with rates named in tariff specifically shown as subject, wholly or in part, to Rule 34 of current Western Classification.)

SECTION 1

CARS FURNISHED AT VARIANCE WITH SHIPPERS' ORDERS AT CARRIERS' CONVENIENCE

Except where specifically provided to the contrary in individual items of this tariff, carrier will furnish car of dimensions or weight carrying capacity ordered by shipper, but if carrier for its convenience furnishes car of different dimensions or weight carrying capacity, the following rules will govern. Shippers may not place, and carriers will not accept, orders for cars of less marked weight carrying capacity than the prescribed minimum weight governing the rate applicable, nor for box, flat or gondola cars exceeding 50 feet 6 inches in length or of weight carrying capacity exceeding 100,000 lbs. When order is for closed car over 46 feet 6 inches in length but not exceeding 50 feet 6 inches in length, any car within this range of lengths may be furnished and will be considered as compliance with order for car of length specified.

- (a) Where car of greater dimensions or weight carrying capacity is furnished, charges will be applied on the basis applicable to car of dimensions or weight carrying capacity ordered (Subject to Note 1).
- (b) *(The provisions of this paragraph do not apply to bulk freight, i. e., freight which carriers do not accept in bulk for less than carload shipment.)* When car of smaller dimensions or less weight carrying capacity is furnished, actual weight applies provided it is loaded to its full visible capacity or as heavily as loading conditions will permit; the balance of the shipment will be taken in another car at actual weight and carload rate, and the entire shipment will be subject to carload minimum weight applicable to the car of dimensions or weight carrying capacity ordered (Subject to Notes 1 and 2).
- (c) *(The provisions of this paragraph apply to bulk freight only, i. e., freight for which no less than carload rating in bulk is provided in current Western Classification.)* When car of smaller dimensions or weight carrying capacity is furnished and loaded to its full visible capacity, actual weight will apply; if not loaded to its full visible capacity, the minimum weight provided, but not to exceed the marked capacity of car, will apply, unless actual weight is greater (Subject to Note 1).
- (d) When open car of specified length is ordered and two shorter cars are furnished, charges on the two cars will be applied on the basis applicable to car of length ordered (Subject to Note 2).
- (e) When refrigerator cars are furnished at carrier's convenience for shipments for which tariff provides a minimum weight greater than the weight carrying capacity of the refrigerator car furnished, the minimum weight will be the weight carrying capacity of the car furnished, but not less than 50,000 lbs. (except where specifically provided to the contrary in individual items of this tariff.)
- (f) Agents will show on bills of lading and waybills dimensions or weight carrying capacity of car ordered and date of order; also number, initials and dimensions or weight carrying capacity of car or cars furnished.

Note 1. Paragraphs (a), (b) and (c) do not apply to Live Stock (see rules of individual carriers lawfully on file with the Interstate Commerce Commission), nor to tank cars, nor to refrigerator cars loaded with freight under ventilated, heated or refrigerated protection.

Note 2. When two cars are furnished in lieu of a larger car ordered, no different service will be performed in placing the two cars for loading or unloading than would be performed in placing the one car ordered, except that when trackage disabilities existing at the place of loading or unloading make it necessary, the two cars may be placed at different but adjacent locations, or at the same location at different times.

SECTION 2

MINIMUM CARLOAD WEIGHTS BASED ON THE MARKED CAPACITIES, CUBICAL CAPACITIES, LENGTHS AND DIMENSIONS OF CARS USED

Minimum carload weights based on the marked capacities, cubical capacities, lengths and dimensions of cars used are subject to the marked capacities, cubical capacities, lengths and dimensions of the cars as shown in I. C. C. - R. E. R. No. 251 of G. P. Conard, Agent.

SECTION 3

MINIMUM CARLOAD WEIGHT FOR SHIPMENTS TRANSFERRED TO-FROM NARROW GAUGE CARS

When necessary to transfer freight from broad to narrow gauge cars, or vice versa, minimum carload weight as provided herein for standard gauge cars applies regardless of the number of narrow gauge cars necessary to transport the shipment.

I. B. For Explanation of Abbreviations, see Item I.

| ARTICLES (See Item 38) | MIN. C. L. WT. (Pounds) | Rates in Cents per 100 Pounds (Except as noted) | |
|--|----------------------------------|--|---|
| | | TO Points taking the following Group Rates (See Item 34) | FROM Points taking RATE BASIS 1 (See Item 35) L. C. L. \| C. L. |
| See following page. | | | |
| Machinery or Machines, or Parts thereof, as described in Items 82 to 88, incl. | | (Subject to Notes 5 and 6). | |
| Articles as described in Item 1186 (See Item 1186). | | Concentrators or "Condensers, milk. | Links, dredge bucket. |
| Articles as described in Item 2015 (See Item 2015). | | Conduits, flexible, iron or steel. | Locomotive Parts as described under heading "Railway Car or Locomotive Parts" in current Western Classification, N. O. S. |
| Articles as described in Item 2306 (See Item 2306). | | Cylinders, cresosoting, steel plate. | Locomotives, compressed air, electric, gas, gasoline or steam (Subject to Note 3). |
| Articles as described in Item 2436 (See Item 2435). | | Devices, automobile hoisting, K. D. | "Machinery or "Machines, cheese factory, creamery or dairy, or Parts thereof, as described in Item 88. |
| Articles as described in Item 2540 (See Item 2540). | | Devices, starting. | "Machinery, refrigerating. |
| Articles as described in Item 3280 (See Item 3280). | | Disinfectors, steam pressure, iron or steel. | "Machines, cutting and packing, ice cream. |
| Air Cleaners, Coolers, Heaters, Humidifiers or Washers and Blowers or Fans combined (Subject to Note 13 (See Item 2660)). | | Dogs, lathe. | "Machines, dish washing (other than household) (Subject to Item 612) (See Item 3096). |
| Arresters, spark. | | Dredges or Parts thereof (Subject to Note 3). | Machines, electrical testing, with or without Lathe or Vise, in crates. |
| "Automobile Hydraulic Rotary Lifts, iron or steel. | | "Driers, "Dehydrators or "Evaporators, fruit or vegetable. | Machines, exercising (Electric Motor combined with attachment for producing vibratory motion), in crates. |
| Bars, roller, paper mill. | | Electrical Appliances as described in Item 78, or Parts thereof. | "Machines, food slicing, in boxes. |
| Bases, dredge. | | Electrodes, carbon (Subject to Item 612) (See Item 2145). | Machines, fruit or vegetable sorting, N. O. S. |
| Batteries (See Item 1290). | | Equipment, welding. | Machines, riveting. |
| Bells or Buzzers, electric, in boxes. | | Exciters. | Machines, shingle. |
| Belting, link, iron. | | Flasks, foundry. | Magnets, lifting, electric. |
| Blocks, fusing. | | Floors, cooling or drying, iron, punched and fitted. | Meters, electric. |
| Blocks, pulley, weighing each 100 lbs. or more, loose or in packages. | | Forges. | Meters, liquid or flow, or Parts thereof, with recording devices boxed, other parts loose or on skids or in crates. |
| Blocks, tackle, weighing each 100 lbs. or more, loose or in packages. | | Frames (ice can or ice tank), iron or steel. | Mills (coffee, drug or spice), power, with or without motors, crated. |
| Blowers, steam jet. | | Freezers, ice cream, and Ice Crushing Machines combined, with or without motors, in crates or on skids. | Mills, roller. |
| Bodies, dumping, iron or steel (Subject to Note 8). | | "Freezers (power), ice cream, brine circulating or direct expansion ammonia. | Molds, ice cream. |
| Boilers, power, including Fire Brick and Fire Clay for setting. | | Furnaces, metal heating or melting, N. O. S. | Mowers (lawn) and Engines combined, in crates; or extra Parts, in boxes. |
| Boxes (fuse), transformer. | | Gages, air, gasoline or oil, in boxes (Subject to Item 612). | Mowers, lawn (other than hand); or extra Parts, in boxes. |
| Brick, fire, including Fire Brick Shapes (See Item 1490). | | Gages, pressure, steam or vacuum, N. O. S., in boxes (Subject to Item 612). | Oil, transformer (See Item 3240). |
| Brushes, carbon (Subject to Item 612). | | Gages, water, other than pressure, in boxes (Subject to Item 612). | Outfits, paint spraying (Subject to Note 9). |
| Cable (copper electric), iron, steel or lead covered, in coils or on reels. | | Gates (iron or steel), head or sluice, canal or reservoir. | Ovens (not Dutch ovens, baking, iron or steel (See Item 2660)). |
| Cable (copper electric), other than iron, steel or lead covered, in boxes, in coils or on reels. | | Gates, water. | "Packers, butter. |
| Cans (not to exceed 3,000 lbs.), milk or cream, N. O. S. | | Gears. | "Packing Devices, Forms or Shapes, in boxes (Subject to Note 10 (See Item 2706)). |
| Capacitors. | | Grading Shield and Arcing Horn Assemblies consisting of: | "Pans, baking, nested or flat, Parts, metal, of articles provided for in this Item (Subject to Item 612). |
| Carbons (Subject to Item 612). | | Arcing Horns. | Parts, pump, for hand or wind-mill pumps, including Buckets with or without chains for hand or Curbs (Pump Boxes, without fixtures or wind-mill Spouts, swivel mill pumps, Tubing |
| Carriages, mold. | | Grading Shields. | |
| Carriers, refrigerator. | | Yokes. | |
| Cars (railway), dump. | | Grease or Oil Guns, hand, without Kits or Tanks, in boxes. | |
| Cars (railway), motor inspection or motor section, loose or in packages, and Power Tops for Hand Cars, loose or in packages. | | Grease or Oil Guns, power, or Grease Kits or Tanks, hand or power, with or without Pumps or Hose, in crates. | |
| Cases, milk bottle. | | Heads, exhaust. | |
| Castings, chain. | | Holders, tool. | |
| Chain, including Chain Shackles, N. O. S. | | Hoops, truss. | |
| Collectors, dust, metal (Subject to Item 612). | | Injectors, steam or water, in boxes (Subject to Item 612). | |
| Compounds, Forms, Shapes or Tubes, insulating electrical, in boxes. | | "Ladies, butter. | |
| | | Ladies, slag. | |
| | | (Continued on following page) | |

B.—For Explanation of Abbreviations, see Item 1.



| ARTICLES See Item 38 | MIN C L W T. Pounds | Rates in Cents per 100 Pounds (Except as noted) | | | |
|---|------------------------------|--|--|-------|--|
| | | TO Points taking the following Group Rates See Item 34 | FROM Points taking RATE BASIS 1 (See Item 35) | | |
| | | | L. C. L. | C. L. | |
| Petroleum Cracking, Distilling or Refining Cylinders, Dephlegmators or Reaction Chambers, iron or steel, with walls not less than 1 inch in thickness, N. O. S., Pulling Cores or Mandrels, N. O. S. Subject to Item 612. | | | | | |
| Pipes, viz.: | | | | | |
| Cocks or Valves, including Gate Valves, N. O. I. B. N., iron or steel, not plated, or iron or steel body, not plated, or Parts thereof. | | | | | |
| Plates (screens), paper or pulp mill, brass, bronze or copper, in boxes. | | | | | |
| Poles, trolley, with or without attachments. | | | | | |
| Pots, slar. | | | | | |
| Printers, butter. | | | | | |
| Pulleys (not shafting pulleys), weighing each 100 lbs. or more, loose or in packages. | | | | | |
| Pumps, hand or windmill, including Beer, Chain or Elevator Bucket, Ham Curing, Link Belt Box Water Elevator, Measuring, Stoneware or Wooden (Suction) Pumps, but exclusive of air pumps. | | | | | |
| Pumps, measuring, hand. | | | | | |
| Racks, test bottle (Subject to Item 612). | | | | | |
| Rams, hydraulic. | | | | | |
| Reactors. | | | | | |
| Registers, air, oil burner, iron or steel (Subject to Note 11). | | | | | |
| Relays, switch. | | | | | |
| Rings (platon), metallic. | | | | | |
| Rolls, bending. | | | | | |
| Rolls, flour, paper or rubber mill, in packages as prescribed (also loose when so provided) in current Western Classification. | | | | | |
| Samplers and Stirrers, milk. | | | | | |
| Savers, milk or cream. | | | | | |
| Scales, butter. | | | | | |
| Scales, milk weighing. | | | | | |
| Scrapers, hydraulic lift. | | | | | |
| Screens, paper or pulp mill, brass, bronze or copper, in boxes. | | | | | |
| Sets, baking pan, consisting of two or more Baking Pans strapped together in sets by band iron or steel, nested in bundles, each set in nest to project above next lower set not more than one-half its height. | | | | | |
| Sheaves (not shafting sheaves), weighing each 100 lbs. or more, loose or in packages. | | | | | |
| Signals, railway crossing sound warning, K. D., in bundles. | | | | | |
| Signals, road traffic, light flashing, in crates or loose and braced in car. | | | | | |
| Signals, sound warning, N. O. I. B. N., in crates. | | | | | |
| Smoke Stacks. | | | | | |
| Stands, washer. | | | | | |
| Stations, air or water, automobile, curb, iron or steel. | | | | | |
| Steerers, ship. | | | | | |
| Sterilizers, milk bottle or can. Subject to Item 612. | | | | | |
| Strainers, curd. | | | | | |
| Tanks, digester, pulp or paper mill, set up or in set up sections. | | | | | |
| Tanks, extra Parts of articles provided for in this Item (Subject to Item 612). | | | | | |
| Tanks, oil, plate or sheet iron or steel, U. S. standard gauge No. 17 or thinner, with hoods. | | | | | |
| Tanks, oil, plate or sheet iron or steel, U. S. standard gauge No. 16 or thicker, with equipment (Subject to Note 7). | | | | | |
| Tanks, oil cabinet, iron or steel (Oil Tanks combined with iron or steel or wooden cabinets), with or without pumps. | | | | | |
| Tanks, oil, portable, with wheels, iron or steel, with or without pumps. | | | | | |
| Tanks, oil, iron or steel, wood covered, with or without pumps. | | | | | |
| Tanks, paraffining (Subject to Item 612). | | | | | |
| Tanks, refrigerator, cream (Subject to Item 612). | | | | | |
| Tape, friction or insulating (See Item 3706). | | | | | |
| Thermostats or Thermo-static Valves, in boxes (Subject to Item 613). | | | | | |
| Tools, electric or pneumatic, or Parts thereof. | | | | | |
| Trucks (motor-car), electric. | | | | | |
| Trucks or Tractors, or Trucks and Tractors combined, platform or warehouse. | | | | | |
| Trucks (non-self-propelling) or extra Parts thereof. | | | | | |
| Turn-tables, other than railway car, locomotive or talking machine. | | | | | |
| Units (radio power for receiving sets), including connections for same (except bulbs), crated. | | | | | |
| Valves (including Bibbs, Cocks and Faucets), other than iron. | | | | | |
| Wheels (iron gear). | | | | | |
| Wheels (iron sprocket). | | | | | |
| Wheels (propeller). | | | | | |
| Wire, brass, bronze or copper, covered, insulated or plain, without connections, in coils or on reels (Subject to Item 612). | | | | | |
| Wringers, household washing machine. | | | | | |
| Machinery, sugar-making, consisting of the following articles (Subject to Note 4): | | | | | |
| Buckets. | | | | | |
| Chain, elevator. | | | | | |
| Collectors, lime dust. | | | | | |
| Coolers, sugar. | | | | | |
| Crystallizers. | | | | | |
| Danek Filter Presses. | | | | | |
| Economizers. | | | | | |
| Evaporators. | | | | | |
| Fans. | | | | | |
| Fittings. | | | | | |
| Frames, mud or juice. | | | | | |
| Granulators. | | | | | |
| Heaters, juice. | | | | | |
| Holists, sugar factory. | | | | | |
| Iron, punched and fitted. | | | | | |
| Knives, beet cutter. | | | | | |
| Machines, centrifugal. | | | | | |
| Mixers, sugar. | | | | | |
| Pans, vacuum. | | | | | |
| Pipe (not conductor nor riveted), iron. | | | | | |
| Plates, press. | | | | | |
| Points, drive well. | | | | | |
| Rolls, sugar mill. | | | | | |
| Scales, beet, automatic. | | | | | |
| Tanks, blow-up. | | | | | |
| Tanks, boiler, feed or water. | | | | | |
| Tanks, carbonation. | | | | | |
| Tanks, molasses storage. | | | | | |
| Tubing, heating or evaporating. | | | | | |
| Wheels, beet. | | | | | |
| Worms, beet. | | | | | |

(Concluded on following page)

See also subject to Item 120.

B.—For Explanation of Abbreviations, see Item 1.

S. C. S. C. No. 9.
R. C. W. C. No. 11.
C. W. C. No. 1.
C. C. W. C. No. 17.
P. U. C. M. F. O.
No. 4.
C. Idaho-W. C. No. 16.
C. O. C. No. 57.
C. W. C. No. 15.
C. I. C. No. 219.
C. O. C. No. 57.
C. I. C. No. 112.
C. W. C. No. 9.
C. Docket 19000.
C. No. 5.
U. C. O. C. No. 57.
C. Md. O. C. No. 57.
P. U. C. O. C. No. 57.
P. U. C. O. C. No. 57.
P. U. C. W. C. No. 14.
C. W. C. No. 13.
C. Mo. O. C. No. 57.
C. Mo. S. C. No. 8.
C. Mo. W. C. No. 17.

P. S. C. Mo. I. C. No. 59.
Mont. R. C. W. C. No. 11.
N. S. R. C. W. C. No. 11.
P. S. C. N. W. C. No. 13.
N. H. P. S. C. O. C. No. 57.
P. U. C. N. J. O. C. No. 57.
S. C. C. N. M. W. C. No. 15.
P. S. C. N. Y. O. C. No. 57.
N. Y. T. C. O. C. No. 57.
N. D. R. C. W. C. No. 1.
Ohio O. C. No. 57.
C. C. Okla. W. C. No. 15.
P. U. C. Ore. W. C. No. 8.
Pa. P. U. C. O. C. No. 57.
R. I. P. U. C. O. C. No. 57.
R. C. T. W. C. No. 13.
P. S. C. Utah W. C. No. 14.
V. C. C. O. C. No. 57.
V. C. C. S. C. No. 26.
V. P. S. C. O. C. No. 57.
W. D. P. S. No. 9.
P. S. C. W. Va. O. C. No. 57.
P. S. C. Wyo. W. C. No. 16.

Agent, A. H. Greenly's I. C. C. - O. C. No. 57.
Agent, E. H. Dulaney's I. C. C. No. 80.
Agent, R. C. Fyfe's I. C. C. No. 26.
Agent, R. A. Sperry's I. C. C. No. 429

(Cancels A. H. Greenly's I. C. C. O. C. No. 56, E. H. Dulaney's I. C. C. No. 71, R. C. Fyfe's I. C. C. No. 25, R. A. Sperry's I. C. C. No. 385, and Supplements.)

A. H. GREENLY'S M. F. I. C. C. - O. C. No. 4

E. H. DULANEY'S M. F. I. C. C. No. 9

R. C. FYFE'S M. F. I. C. C. No. 4.

R. A. SPERRY'S M. F. I. C. C. No. 9

(Cancels A. H. Greenly's M. F. I. C. C. O. C. No. 3, E. H. Dulaney's M. F. I. C. C. No. 7, R. C. Fyfe's M. F. I. C. C. No. 3, R. A. Sperry's M. F. I. C. C. No. 4, and Supplements.)

C. T. C. O. C. No. 57. C. T. C. S. C. No. 21.

C. T. C. W. C. No. 24.

(Cancels A. H. Greenly's C. T. C. O. C. No. 56, R. C. Fyfe's C. T. C. W. C. No. 2, E. H. Dulaney's C. T. C. S. C. No. 22, and Supplements.)

S. B. O. C. No. 13. S. B. W. C. No. 14.

S. B. S. C. No. 31. S. B. I. C. No. 10.

(Cancels A. H. Greenly's S. B. O. C. No. 12, E. H. Dulaney's S. B. S. C. No. 29, R. C. Fyfe's S. B. W. C. No. 13, R. A. Sperry's S. B. I. C. No. 9, and Supplements.)

S. B. I. O. C. No. 5. S. B. I. W. C. No. 7.

S. B. I. S. C. No. 11.

(Cancels A. H. Greenly's S. B. I. O. C. No. 4, E. H. Dulaney's S. B. I. S. C. No. 9, R. C. Fyfe's S. B. I. W. C. No. 6, and Supplements.)

(For State Cancellations, see page i.)

NSOLIDATED FREIGHT CLASSIFICATION No. 13

(SOUTHERN CLASSIFICATION No. 56)

(ILLINOIS CLASSIFICATION No. 21)

Official Classification No. 56; Southern Classification No. 55; Western Classification No. 67, and Illinois Freight Classification No. 20, and Supplements)

Applies on Freight Traffic covered by tariffs issued subject to either the Official Classification, Southern Classification, Western Classification, or Illinois Classification, as such tariffs may provide.

ED APRIL 20, 1939

EFFECTIVE JUNE 5, 1939

(Except as otherwise provided herein)

Issued under the terms of Rule 1 of Tariff Circular No. 30, as amended, under Special Permission of the Interstate Commerce Commission No. 128926 of September 5, 1933, as amended.

making the correction of Fourth Section and figures resulting from changes in this classification or these classifications).

and filed with the following Commissions by A. H. Greenly, E. H. Dulaney, R. C. Fyfe and R. A. Sperry, Agents, only the indicated entries named herein:

Interstate Commerce Commission.

Board of Transport Commissioners for Canada.

United States Maritime Commission.

Alabama Public Service Commission.
Arizona Corporation Commission.
Arkansas Corporation Commission.
Railroad Commission of the State of California.
Public Utilities Commission of Colorado.
Public Utilities Commission of Connecticut.
Public Utilities Commission of Idaho.
Illinois Commerce Commission.
Indiana Public Service Commission.
Iowa State Commerce Commission.
State Corporation Commission of Kansas.
Railroad Commission of Kentucky.
Maine Public Utilities Commission.
Maryland Public Service Commission.
Massachusetts Department of Public Utilities.
Michigan Public Utilities Commission.
Minnesota Railroad and Warehouse Commission.
Public Service Commission of Missouri.
Board of Railroad Commissioners of Montana.
Nebraska State Railway Commission.

Public Service Commission of Nevada.
New Hampshire Public Service Commission.
New Jersey Public Utilities Commission.
State Corporation Commission of New Mexico.
State of New York Public Service Commission.
State of New York Transit Commission.
North Dakota Board of Railroad Commissioners.
Ohio Public Utilities Commission.
Corporation Commission of Oklahoma.
Public Utilities Commissioner of Oregon.
Pennsylvania Public Utility Commission.
Rhode Island Public Utilities Commission.
Railroad Commission of Texas.
Public Service Commission of Utah.
Vermont Public Service Commission.
Commonwealth of Virginia State Corporation Commission.
Department of Public Service of Washington.
West Virginia Public Service Commission.
Public Service Commission of Wisconsin.
Public Service Commission of Wyoming.

A. H. GREENLY,

E. H. DULANEY,

R. A. SPERRY,

R. C. FYFE,

Agent for lines in
Official Classification
1 Liberty Street,
NEW YORK, N. Y.

Agent for lines in
Southern Classification
101 Marietta Street,
ATLANTA, GA.

Agent for lines in
Illinois Classification
236 Chicago Union Station
CHICAGO, ILL.

Agent for lines in
Western Classification
202 Chicago Union Station
CHICAGO, ILL.

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CONSOLIDATED FREIGHT CLASSIFICATION NUMBER 13

Publishing the Ratings, Rules and Regulations of the Official, Southern, Western and Illinois Classifications

RULE 19.

Ratings on articles K. D. (knocked down) apply only when the article is taken apart in such manner as to materially reduce space occupied. Merely separating article into parts without reducing bulk does not constitute knocking down or entitle article to K. D. rating.

RULE 20.

Parts or pieces constituting a complete article, received as one shipment, on one bill of lading, will be charged at the rating provided for the complete article.

RULE 21.

Section 1. Unless otherwise provided the terms "nested" or "nested solid" mean:

Nested: Three or more different sizes of the articles must be enclosed each smaller within the next larger or that three or more of the article must be placed one within the other so that each upper article will not project above the next lower article more than one-third of its height.

Nested Solid: Three or more of the articles must be placed one within or upon the other so that the outer side surfaces of the one above will be in contact with the inner side surfaces of the one below and each upper article will not project above the next lower article more than one-quarter inch.

Section 2. The provisions shown in Section 1 of this Rule prohibit the application of "nested" ratings when articles of different name or material, whether grouped in one description or shown separately, are nested or enclosed one within the other.

RULE 22.

Section 1. The term "in the rough" used in specifications for wooden articles applies when such articles are not further manufactured than sawed, hewn, planed or bent.

Section 2. The term "in the white" applies to wooden articles when farther manufactured than provided for in Section 1, and may include one coat of priming, but does not apply when the articles have been painted or varnished.

Section 3. The term "finished" applies to wooden articles after they have passed the stage of manufacture provided for in Section 2.

RULE 23.

Section 1. Carriers' agents must not act as agents of shippers or consignees for the assembling or distribution of C. L. or L. C. L. freight.

Section 2. Carriers' agents at points of shipment must not accept freight to be carried at C. L. ratings or rates for distribution to two or more parties by carriers' agents at points of destination.

Section 3. Except as otherwise provided in Section 2 of Rule 14, agents at points of destination must deliver freight carried at C. L. ratings or rates to one consignee only, and must not accept orders from shippers or consignees calling for split deliveries according to brands, marks, sizes or other identification of packages.

Section 4. Except as otherwise provided in Section 2 of Rule 14, if at the request of the owner of the property or his authorized agent, a C. L. shipment is delivered to more than one consignee, L. C. L. ratings or rates will be applied on the entire shipment, except that the portion delivered to any one consignee will be subject to Rule 15, Section 1.

RULE 24.

Section 1. When C. L. freight, the authorized minimum weight for which is 30,000 lbs. or more, is received in excess of the quantity that can be loaded in or on one car, the following shall apply:

*The shipment must be made from one station, by one shipper, in one calendar day running from midnight to midnight, on one shipping order or bill of lading, to one consignee and destination.

Each car, except car carrying the excess, must be loaded as heavily as loading conditions will permit, to the marked capacity of car if practicable, and each car so loaded charged at actual or authorized estimated weight, subject to established minimum C. L. weight, and at C. L. rate or rating applicable.

The marked capacities of cars are shown in Agent G. P. Conard's I. C. C.-R. E. R. No. 250, C. T. C.-R. E. R. No. 250, supplements thereto and reissues thereof.

Section 2. The excess over quantity that can be loaded in or on one car shall be charged:

If loaded in one closed car, at actual or authorized estimated weight, and at C. L. rate or rating applicable on entire shipment.

If loaded on one open car, at actual or authorized estimated weight and at C. L. rate or rating applicable on entire shipment, subject to a minimum charge of 1,000 lbs. at first class rate.

(Continued)

Definition of the term "K. D."

Parts or pieces constituting a complete article.

Definition of "nested" or "nested solid".

"Nested" ratings not to apply

Wooden articles "in the rough"

Wooden articles "in the white"

Wooden articles "finished"

Carriers' agents not to act as agents of shippers or consignees.

Ratings to apply when at owner's request carloads are delivered to more than one consignee.

Freight in excess of full carloads.

Conditions of shipment.

Loading of cars.

Charges for excess

30 THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY-COAST LINES 30

FREIGHT WAYBILL

To be used for Single Consignments, Carload and Less Carload

| | | | | | | | | | |
|--|--|--|--|--|--|---|--|---|--|
| TRAIN SYMBOL E STATION SYMBOL LA. 719 | | REEDED BAL | | WEIGHT IN TONS Gross 32 Tare 10 Net 10 | | LENGTH OF CAR Ordered _____ Furnished _____ | | MARKED CAPACITY OF CAR Ordered _____ Furnished _____ | |
| CAR INITIALS AND NUMBER CMSTPP 87164 | | C. L. Transferred to or L. C. L. Leading No. | | DATE OCT 5 1940 | | WAYBILL No. AT&SF- | | | |
| STATION CHICAGO ILLS | | STATE | | FROM STATION RR 121-1 LOS ANGELES CALIF | | STATE | | | |
| CONIGNED TO STATION | | STATE | | FULL NAME OF SHIPPER and, for C. O. D. Shipments, the Street and Post Office Address, and Invoice Number if Available. GLOBE FREIGHT SERVICE SHPRS LAC 564 565 | | | | | |
| THORITY UTE (Show each Junction and Carrier in Route Order to Destination of Waybill). BELEN AT&SF | | | | Show "A" If Agent's Routing or "B" if Shipper's Routing FOR | | Origin and Date, Original Car, Transfer Freight Bill and Previous Waybill Reference and Routing when Rebillid. <i>San Antonio 10/16/40</i> | | | |
| INSIONE AND ADDRESS GLOBE FREIGHT SERVICE C-O U S ELEC MOTORS INC 1500 S WESTERN C-O MIDLAND WAREHOUSE CO 1500 SO WESTERN C-O AT&SF BELLVIEW | | | | WEIGHED WEIGHED AT 63480 44000 19480 WEIGHING AND INSPECTION DEPT. | | | | | |
| T&SF TRAIN 138 ALL THEY WAY | | | | GROSS TARE ALLOWANCE NET | | | | | |
| INSTRUCTIONS (Regarding Lading, Ventilation, Heating, Milling, Weighing, Etc. If load, Specify when Lading Should be Charged). <i>mb 227</i> | | | | Indicate by symbol in column provided * how weights were obtained for L. C. L. Shipments only. R—Railroad Scale. S—Shipper's Toned Weights. E—Estimated—Weight and Carrot. T—Tare Classification or Minimum. | | | | | |
| L. C. L. Traffic Transfer Stamps To Be Shown in This Space | | | | DESCRIPTION OF ARTICLES AND MARKS C-L MACHINERY & AUTO METAL PARTS AS DESCRIBED IN ITEM 3060 & ALL ITEMS COVERED BY ITEM 3060 TCFB EB TARIFF 3-N DETAILED [REDACTED] UBL SL&C 50 FT CAR, ORD AND 2 SMALLER CARS FURN RR COM PART LOT IN IC 176257 COVERED BY L A CALIF TO CHICAGO ILLS WB AT&SF-6714 10-5-40 | | | | | |
| SPECIAL BRACING & BLOCKING—DO NOT TRANSFER UBL | | | | WEIGHT 19480 27860 47340 | | RATE 178 | | FREIGHT 842.65 | |
| ADVANCES 120.00 | | | | PREPAID | | Partial unloading at Chicago | | | |
| First Junction CHICAGO ILLS | | | | Outbound Junctions (List with Street Junctions, Station Name, Space and Order Preferred). CHICAGO ILLS | | Found Junction CHICAGO | | Destination Agent Will Stamp—Station Name and Date Reported OCT 16 1940 CHICAGO | |

30 THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY—COAST LINES 30

STATION RECORD

Form 100



Consignee **GLOBE SERVICE C/O U.S. ELECTRICAL MOTORS INC OCT 14/40**
 Destination **1500 SO WESTERN AVE CHGO**
 Route **CHGO ILLS**

POINT OF ORIGIN TO DESTINATION

The Atchison, Topeka and Santa Fe Railway Co.

Way-Billed From

Way-Bill Date and No

Full Name of Shipper

Original Point and Date of Shipment

Connecting Line Reference

Previous Way-Bill Reference

NUMBER OF PACKAGES, ARTICLES AND MARKS

WEIGHT

RATE

FREIGHT

ADVANCES

TOTAL

CL MACHY & AUTO METAL PARTS AS
DEPOT IN ITEM 3060 AND ALL ITEMS SHIPPED BY ITEM 3060 TO CHGO
CHGO ILLS 3/4
CONV PART LOT
IN IC 176257 SHIPPED BY LOS ANG
CALIF TO CHGO ILLS ATSF 12480
WB 6714 PARTIAL UNLUG 27860
AT CHGO 10/5/40 SPECIAL 47340 178 84265
BRACING & BLKG DO NOT TRANSFER 1302
85567

LOCATION

DELIVERY

BY

(This is a copy of the freight bill and is not a receipt for transportation charges paid.)

G 63480 T 44000 NET 18480 VR-TOTAL TO COLLECT

STATION RECORD

Form 1073-A Regular



Consignee

Chicago, ILL

Destination

FREIGHT
BILL NO

Route

1999

The Atchison, Topeka and Santa Fe Railway Co.

Way-Billed From

Original Point and Date of Shipment

Connecting Line Reference

Previous Way-Bill Reference

Original Car Initials and No

NUMBER OF PACKAGES, ARTICLES AND MARKS

WEIGHT

RATE

FREIGHT

ADVANCES

TOTAL

METAL
CL MACHY & AUTO PARTS

WGT & CHGS ON LA CALIF TO CHGO ILLS
WB ATSF 6713 10/5/40

COLLECT

PART LOT TO CUSTP&P 87164
SPECIAL BRACING & BLKG DO NOT TRANSFER
UPL SLC
G 74160 T 463 NET 27860 VR

LOCATION

DELIVERY

BY

(This is a copy of the freight bill and is not a receipt for transportation charges paid.)

TOTAL TO COLLECT

28

Original paid freight bills should accompany all claims for overcharge, loss or damage.
Charges payable in advance.

Form 1881 Regular

CONSIGNEE.

PREPAID FREIGHT BILL

Santa Fe LOS ANGELES, CAL.,

19

GLOBE FRT SERV

Via OCT 15 1940

FREIGHT
BILL No. 3157 J

To The Atchison, Topeka and Santa Fe Railway Company—Coast Lines, Dr.

| WAYBILL | | CAR | | FROM | | CONSIGNEE AND DESTINATION | | |
|-----------------------------|-------------------|------------|----------|-------------------|------|---------------------------|----------|-------|
| DATE | NUMBER AND SERIES | INITIALS | NUMBER | LOS ANGELES, CAL. | | GLOBE FRT SERV | | |
| OCT 15 | 1940 AT | 6913 CMSTP | 87164 IC | 176257 | | CHGO ILL | | |
| FOR FREIGHT AND CHARGES ON | | | | WEIGHT | RATE | FREIGHT | ADVANCES | TOTAL |
| CL MACHRY ETC | | | | | | | | |
| MIL 87164 63480 44000 19480 | | | | | | | | |
| IC 176257 74160 46300 27860 | | | | 47340 | VAR | 85567 | | |
| TO FULLY PREPAY | | | | | | | | |
| RECEIVED PAYMENT | | | | (((COPY))) | | TOTAL | | |
| | | | | Agent. | | TOTAL TO COLLECT | | 85567 |

This form of Freight Bill to be used by FORWARDING AGENTS, and only in cases where shipments are verified PREPAID.

30 The Atchison, Topeka and Santa Fe Railway Company—Coast Lines 30

PREPAID ONLY WAYBILL

INSTRUCTIONS GOVERNING THE USE OF THIS FORM.

Use this waybill only to transfer credits to another station as set forth in FORM 500, INSTRUCTIONS TO STATION FREIGHT AGENTS. Make a separate prepaid only waybill for each adjustment even where several adjustments are made on the same revenue waybill. Describe clearly each consignment adjusted and also where the revenue waybill contains more than one consignment, write the number of that consignment in the space "Full Name of Shipper, Etc." When reference to revenue waybill is not available, enter in the "Remarks" column any facts which will assist the receiving agent in finding the revenue waybill. If the receiving agent refunds the prepaid, receipt must be taken in a space set aside therefor; if he applies the prepaid against an uncollected item he will fill out and sign the certificate hereon. When unable to refund the amount of the prepaid or to credit it to the station, enter the amount thereof in the "Freight" column of the prepaid only. Then report the Freight in the "Freight" column of Form 309 and the Prepaid in the "Prepaid" column of that form.

| | | | | | |
|--|-------|---------------------------|--------------------|------------------------------|--|
| CAR INITIAL AND NUMBER (As Shown on Revenue Waybill) CMSTP&P 87164 6 176257 | | DATE OCT 15TH 1940 | | WAYBILL No. ATSF 6913 | |
| STATION | STATE | FROM | STATION | STATE | |
| CHICAGO ILL | | 12141 GI | LOS ANGELES | CALIF | |

Transfer Credit Account **LOS ANGELES** Waybill No. **6713-14th** 10 5 40 Freight Bill No. _____ Date _____ 19__

| | | | | | | |
|---|---------------------|--------|------|---------|----------|---------|
| Full Name of Shipper, Point of Origin, Connecting Carriers, Billing Reference, Consignment No. LOBE FREIGHT SERVICE MACHY ETC IL 87164 GROSS 63400 TARE 44000 NET 19400 C 176257 GROSS 74160 TARE 46300 NET 27860 | ABOVE WAYBILL READS | | | | | |
| | ARTICLES | WEIGHT | RATE | FREIGHT | ADVANCES | PREPAID |
| | | | | | | |
| | | | | | | |

| | | | | | | |
|---|---------------------------|--------|------|---------|----------|---------|
| Consignee and Destination LOBE FREIGHT ARE PENNOYER CHICAGO ILL 36528 | ABOVE WAYBILL SHOULD READ | | | | | |
| | ARTICLES | WEIGHT | RATE | FREIGHT | ADVANCES | PREPAID |
| | | | | | | |
| | | | | | | |

NOTE: DO NOT REPORT ABOVE FIGURES ON FORM 306 OR 309.

| | | |
|---------------------------------------|---------------------|---------------|
| REMARKS PAID ON CHGO FB | FIGURES SHOWN BELOW | |
| | FREIGHT | PREPAID |
| | PFO | 355.67 |

Received from _____ and on shipment herein described. _____ 19__

| | |
|---|---|
| CERTIFICATE I certify that I have applied the amount of the credit received by Prepaid Only Waybill against the uncollected Freight Bill Date 10/15/40 Agent St. Louis | Payee Sign Here Station Agent will stamp here in the date received Destination Agent will stamp here in the date reported Date OCT 22 1940 CHICAGO |
|---|---|

FORM 1881 REGULAR

PREPAID FREIGHT BILL

Santa Fe

LOS ANGELES, CALIF., July 30 1940

Globe Freight Service

VIA

FREIGHT/
BILL NO. AO-476

To The Atchison, Topeka and Santa Fe Railway Company—Coast Lines, Dr.

| WAYBILL | | CAR | | FROM | CONSIGNEE AND DESTINATION | | |
|--|-------------------|--------------|-----------------|---------------------|---------------------------|------------------|----------|
| DATE | NUMBER AND SERIES | INITIALS | NUMBER | LOS ANGELES, CALIF. | Globe Freight Ser | | |
| 10-5-40 | ATSF 6713 | CMSTPP IC | 87164 176257 | | Chicago | | |
| FOR FREIGHT AND CHARGES ON | | | | WEIGHT | RATE | FREIGHT | ADVANCES |
| Machy & Metal auto parts Lead car 27860 as 2nd car | | | | 30000 | | | |
| | | | | 19480 | | | |
| Cars appropriated. Protect Rule 24 | | | | 49480 | 2 12 SWS | 1048 98 13 02 | |
| | | | | | | | |
| RECEIVED PAYMENT | | | | | | TOTAL | 1062 00 |
| | | | | | | Paid | 855 67 |
| AGENT. | | | | | | TOTAL TO COLLECT | 206 33 |

This form of Freight Bill to be used by FORWARDING AGENTS, and only in cases where shipments are waybilled PREPAID.

BOE FRIGHT SERVICE Form 18, Regular—Small JTC 7446 1024 (1-30) Western 343 - 344.
From Domestic Freight Bill of Lading, adopted by carriers in 1924; Western 343 - 344.
Classification territories, March 15, 1925, as amended August 1, 1926.

UNIFORM STRAIGHT BILL OF LADING—ORIGINAL Not Negotiable Shipper's No. _____
Agent's No. _____
The Atchison, Topeka and Santa Fe Railway Company
COAST LINES

RECEIVED, subject to the classifications and tariffs in effect on the date of the issue of this Bill of Lading.
Los Angeles, Calif 7/8/39 193 From **GLOBE FREIGHT SERVICE**

Party described below, in apparent good order, except as noted (contents of packages unknown), marked, consigned, and destined as indicated below, which said consignment is being understood throughout this contract as meaning any person or corporation in possession of the property under the contract, and agrees to carry to its usual place of delivery or destination, if on its own road or its own water link, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property, or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the rules and regulations of the carrier, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

Mail or street address of consignee—For purposes of notification only: _____
To **GLOBE FREIGHT SERVICE & Pennoyer Merchants Transfer Co 742 W Polk St**

Origin **CHICAGO, Illinois** State of _____ County of _____
Destination **Santa Fe all the way**
NYC 151211 Seals 196635-636
Origin Carrier **ATSF 14th St Delivery** Car Info **PRR 57625** Car No. **196637-638**

| NO. | DESCRIPTION OF ARTICLES, SPECIAL MARKS, AND EXCEPTIONS | Weight (Net to Carriers) | Class or Rate | Check Col. | Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignee, the consignee shall sign the following statement: The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges. |
|-----|---|--------------------------|---------------|------------|---|
| 1 | Carload Machinery & Auto Metal Parts as described in Item 3050 & all Items covered by Item 3060, TCFB | KB | TCFB | KB | <div>Received by _____ (Consignee) in full payment of the charges on the property described herein. To be prepaid.</div> <div>PREPAID THRU</div> <div>Received by _____ (Consignee) in full payment of the charges on the property described herein.</div> |
| | DETAILED LIST TO FOLLOW | | | | |
| 2 | Wood Boxes Wet Storage Batteries, wt 331 lbs wt INOL | | | | |
| | LABEL REQUIRED FOR NYC 151211 | | | | |
| | S L & C | | | | |
| | 1 50 foot car ordered, 2 smaller cars furnished by | | | | |
| | SPECIAL BRACING & BLOCKING:::DO NOT TRANSFER | | | | |

When goods are moved between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is a "through bill" or a "local bill". If it is a "through bill", the carrier must state the name of the carrier to whom the goods are to be delivered. If it is a "local bill", the carrier must state the name of the carrier to whom the goods are to be delivered. The carrier must also state the name of the carrier to whom the goods are to be delivered.

BE FREIGHT SERVICE Shipper _____ Agent _____
TRANSPORTATION & WAREHOUSE CO

Postoffice address of shipper _____
Per _____
1

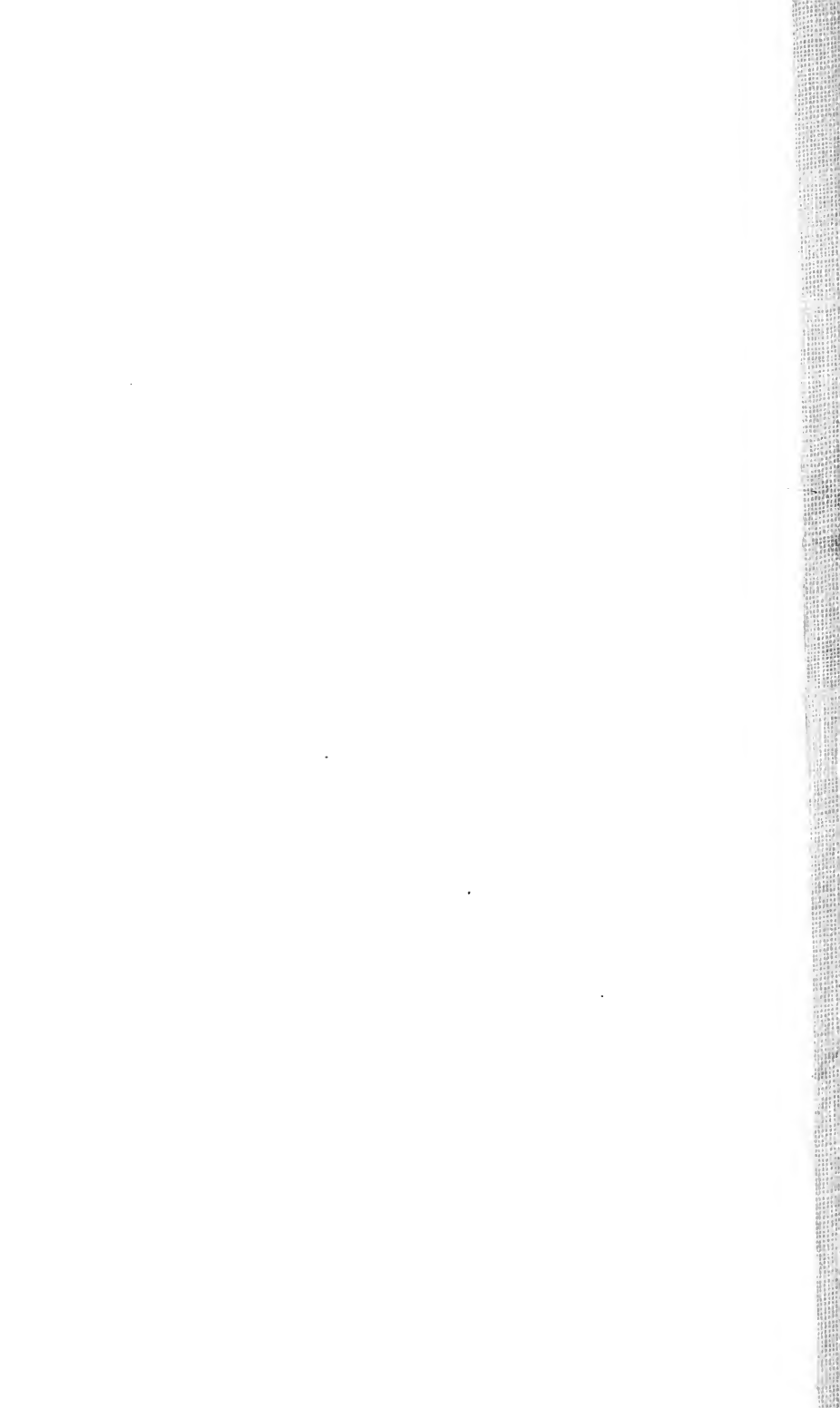


EXHIBIT "D"

In the District Court of the United States
Southern District of California

Central Division

No. 2384-BH

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, a corporation,
Plaintiff,

vs.

DANIEL P. WHITE, an individual doing business as
GLOBE FREIGHT SERVICE,
Defendant.

OPINION

Appearances:

Jonathan C. Gibson, Esq.

M. W. Reed, Esq.

L. W. Butterfield, Esq.

William F. Brooks, Esq.

448 Kerckhoff Building

Los Angeles, California,

Attorneys for Plaintiff,

Arthur H. Glanz, Esq.

Theodore W. Russell, Esq.

111 West Seventh Street

Los Angeles, California,

Attorneys for Defendant.

This action was instituted by plaintiff against defendant to recover undercharges on 118 separate carload shipments made by defendant during the period of August.

1939 to February, 1941, which charges plaintiff contends must be collected in accordance with the lawfully published tariffs then in effect.

Like in the case of Atchison, Topeka and Santa Fe Railway Company v. Judson Freight Forwarding Company etc., No. 2265-BH of the files of this court, this day decided by me, the question for determination is whether the shipper should have been billed for two forty foot cars on each shipment instead of one fifty foot car. Originally, the shipper was billed on the theory that in each instance a fifty foot car had been ordered and that two forty foot cars had been furnished at carrier's convenience, under what is commonly known as the two for one rule. Thereafter, the carrier determined, after an investigation by the Interstate Commerce Commission, that the lawful tariff on each shipment had not been collected, hence this suit.

The parties have stipulated that the higher freight [33] charges claimed by plaintiff in each cause of action are lawfully applicable in the event the court shall find that two smaller cars were not lawfully substituted for a larger car ordered by the defendant in compliance with the tariff rules and regulations governing the substitution of two smaller cars for a larger one.

The facts disclose that all shipments went forward under Item 503 of Trans-Continental Freight Bureau East Bound Tariff No. 3, Series I. C. C. No. 1431, which in part provides:

“Except where specifically provided to the contrary in individual items of this tariff, carrier will furnish car of dimensions or weight carrying capacity ordered by shipper, but if carrier for its convenience furnishes car of different dimensions or weight carrying capacity, the following rules will govern. * * *

"When car of smaller dimensions or less weight carrying capacity is furnished, actual weight applies provided it is loaded to its full visible capacity or as heavily as loading conditions will permit; the balance of the shipment will be taken in another car at actual weight and carload rate, and the entire shipment will be subject to carload minimum weight applicable to the car of dimensions or weight carrying capacity ordered

(Subject to Notes 1 and 2) . . ."

The facts surrounding the circumstances under which the forty foot cars were furnished are best reflected by the testimony of the defendant, who in substance testified as follows:

He had been engaged in the freight forwarding business for about twenty-five years and had wide experience in the freight forwarding business, was and is generally familiar with the published tariffs, rates, rules and regulations. In April, 1937, he started his own freight forwarding business in Los Angeles at a location adjacent to the Wingfoot Station of carrier. He specialized in east-bound freight consisting principally of heavy machinery and automobile parts. Shortly after commencing business, in April or May, 1937, he talked to the agent of the carrier and made inquiry into the method of the operations of his competitors. The agent not being informed made inquiry and advised the shipper that the National Carloading Corporation was shipping under the so-called two for one rule. The shipper then asked if it "would be o. k. or satisfactory, under the tariff, if we could use the same loading rules as the other companies." He stated he was familiar with Item 503 and that the rules and regula-

tions on loading equipment had to be followed and "that's why I wasn't [34] going to do anything, or take any advantage of any misinterpretation of the tariff. Before we started loading the forty foot cars I wanted to be sure the tariff authority was there." The agent of the carrier assured the shipper he could have two forty foot cars in place of the fifty foot car ordered and that the same would not be in violation of the published tariffs.

Thereafter, the shipper would usually order cars by telephone. When ordering cars, he would not specify the equipment, but simply advise the carrier "we want to load today." Thereupon two forty foot cars would be furnished. The shipper would prepare his own bill of lading and endorse thereon "1-50 foot car ordered; 2 smaller cars furnished by R. R."

In February 1941, the carrier discontinued the practice of furnishing two forty foot cars in lieu of one fifty foot car. The shipper vigorously protested the change and contended the tariff provisions had not been violated.

From the foregoing testimony of the shipper the following facts appear: That the shipper was familiar with the provisions of Item 503; that the shipper at no time ordered a fifty foot car; that the shipper was furnished two forty foot cars but was billed on the basis that one fifty foot car had been ordered, in accordance with an agreement between the parties; that the shipper knew when he advised the carrier he was ready to load that he would be furnished two forty foot cars; that the shipper acted in good faith and relied upon the representations of the agent of the carrier that the furnishing of two forty foot cars in lieu of one fifty foot car was not a violation of the published tariff provisions.

Shipper contended and offered evidence to the effect that carrier's convenience was subserved by the substitution of the smaller cars for the larger car. The evidence in this respect is conflicting. Suffice it to say that in the substitution of the smaller cars, no consideration was given to the carrier's convenience. Furthermore, It is not possible to visualize the exact conditions existing at the time of each shipment at this late date. The evidence does disclose that at all times the carrier had fifty foot cars available and readily accessible. [35]

It is further contended by the shipper that the substitution afforded him no advantage. The shipper wanted the smaller cars and was very vociferous when their use was denied him. These facts, coupled with the knowledge that he thereby had considerable additional floor space for loading, convinced me that the shipper gained an advantage and preferential treatment by the carrier.

It will be noted under Item 503, that the shipper is entitled to the equipment ordered and the carrier must comply with the order of the shipper and can only substitute other equipment for its own convenience. Under no circumstances would "carriers' convenience" come into play until an order had been placed for specified equipment. (See *Western Trunk Line Rate Increases*, 43 I. C. C. 481-493; *Noble v. Baltimore & Ohio Railroad Company*, 22 I. C. C. 432). If no order for specified equipment had been placed then the shipper would be liable for equipment furnished by carrier and used by shipper.

Under the testimony of the shipper it is apparent that no order was placed for specified type of equipment and as a result there would be no legal grounds upon which the shipper would be entitled to the benefits of said Item 503.

Shipper contends that the smaller cars were furnished for carrier's convenience. Shipper offered evidence to the effect that carrier's convenience not only included operating convenience, but it was a convenience to the carrier in meeting truck competition. This rule has no application in meeting competition. (*U. S. v. Chicago Heights Trucking Co.*, 310 U. S. 344). While the term "carriers' convenience" is one of long use, our reviewing courts never have had occasion to define said term. To me, the term signifies, as used in said Item 503, that before the carrier is justified in making a substitution, the car ordered must not be readily available and operatively advantageous for the carrier to furnish.

The testimony of the shipper demonstrates that no "carriers' convenience" was considered but that two forty foot cars were furnished under the guise that a fifty foot car had been ordered. The shipper knew that a fifty foot car had not been ordered. He knew that the smaller cars were being furnished pursuant to an arrangement with the agent of the carrier back in 1937. He knew when he prepared the bill of lading and endorsed thereon "1-50 ft. car ordered, 2 smaller cars furnished by R. R." that it was not a true statement. Assuming he believed he was [36] not violating any tariff provision and he was misled by the agent of the carrier, still he is chargeable with the knowledge and is liable for the legal rates.

In *McFadden v. Alabama Great Southern R. Co.*, 241 Fed. 562, the court said:

"In approaching this question we lay aside all considerations of conduct, intention, mistake and misunderstanding respecting the rate paid, for the law is very well settled that the Act to Regulate Commerce demands not only that the carrier shall charge but

that the shipper shall pay the legal rate. The contract between carrier and shipper is no longer a contract as to rates; it is merely a contract that the carrier will render transportation service when the shipper pays the legal rate. When the transportation is interstate, the interstate rate is the legal rate, and that rate must be demanded and paid, for both the carrier and shipper are charged with notice of it; and if a lesser rate is charged and paid, intentionally or innocently, recovery must be had against the shipper for the difference, in order that the policy of the law against unjust discrimination may be carried out."

Keogh v. Chicago & Northwestern Railway Company, 260 U. S. 156, states as follows:

"* * * The legal rights of a shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier. *Texas & Pacific R. R. Co. v. Mugg*, 202 U. S. 242; *Louisville & Nashville R. R. Co. v. Maxwell*, 237 U. S. 94; *Atchison, Topeka & Santa Fe Ry. Co. v. Robinson*, 233 U. S. 173; *Dayton Iron Co. v. Cincinnati, New Orleans & Texas Pacific Ry. Co.*, 239 U. S. 446; *Erie R. R. Co. v. Stone*, 244 U. S. 332. And they are not affected by the tort of a third party. Compare *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co. v. Fink*, 250 U. S. 577. This stringent rule prevails, because otherwise the paramount purpose of Congress—prevention of unjust discrimination—might be defeated."

In the case of *Pittsburgh, C., C. & St. L. Ry. Co. v. Fink*, 250 U. S. 577, 40 Sup. Ct. Rep. 27, it appears that on a shipment, the way bill specified the charges in the sum of \$15.00. The legal rate should have been \$30.00. The state court denied the carrier the right to recover on the undercharge, and the United States Supreme Court in reversing the state court said among other things:

"It was, therefore, unlawful for the carrier upon delivering the merchandise consigned to Fink to depart from the tariff rates filed. The statute made it unlawful for the carrier to receive compensation less than the sum fixed by the tariff rates duly filed. Fink, as well as the carrier, must be presumed to know the law, and to have understood that the rate charged could lawfully be only the one fixed by the tariff. When the carrier turned over the goods to Fink upon a mistaken understanding of the rate legally chargeable, both it and the consignee undoubtedly acted upon the belief that the charges collected were those authorized by law. Under such circumstances consistently with the provisions of the Interstate Commerce Act the [37] consignee was only entitled to the merchandise when he paid for the transportation thereof the amount specified as required by the statute. For the legal charges the carrier had a lien upon the goods, and this lien could be discharged and the consignee become entitled to the goods only upon tender or payment of this rate. *Texas & Pacific Railway Co. v. Mugg*, 202 U. S. 242, 26 Sup. Ct. 628, 50 L. Ed. 1011. The transaction, in the light of the act, amounted to an assumption on the part of Fink to pay the only legal rate the carrier had the right to charge or the consignee the right to pay. This may

be in the present as well as some other cases a hardship upon the consignee due to the fact that he paid all that was demanded when the freight was delivered; but instances of individual hardship cannot change the policy which Congress has embodied in the statute in order to secure uniformity in charges for transportation. *Louisville & Nashville Railroad Co. v. Maxwell*, 237 U. S. 94, 35 Sup. Ct. 494, 59 L. Ed. 853, L. R. A. 1915E, 665. In that case the rule herein stated was enforced as against a passenger who had purchased a ticket from an agent of the company at less than the published rate. The opinion in that case reviewed the previous decisions of this court, from which we find no occasion to depart."

In the recent case of *Union Pacific Railroad Company v. U. S.*, 313 U. S. 450-462, the court, through Mr. Justice Reed said:

"Violation of the commerce acts through receipt of advantages is to be tested by actual results, not by intention. * * * In fact, favoritism which destroys equality between shippers, however brought about, is not tolerated."

Mr. Justice Brandeis in *Louisville & Nashville Railroad Company v. Central Iron & Coal Company*, 265 U. S. 59-65 said:

"* * * The amount of the freight charges legally payable was determined by applying this tariff rate to the actual weight. Thus, they were fixed by law. No contract of the carrier could reduce the amount legally payable; or release from liability a shipper who had assumed an obligation to pay the charges. Nor could any act or omission of the carrier (except

the running of the statute of limitations) estop or preclude it from enforcing payment of the full amount by a person liable therefor."

Tariff provisions have the force and effect of a statute and cannot be deviated from under any circumstances. *Penn. Railroad Company v. International Coal Mining Co.*, 230 U. S. 184, 33 Sup. Ct. Rep. 893; *Louisville & Nashville Railroad Company v. Maxwell*, 237 U. S. 94; 35 Sup. Ct. Rep. 494; *Baldwin v. Scott County Milling Co.*, 307 U. S. 478; 13 C. J. S. 873-876; *Button v. Atchison, Topeka & Santa Fe Railway Co.*, 1 Fed. (2d) 709.

It is thus apparent that the defendant gained an advantage contrary to the laws governing the regulation of interstate carriers of commerce, and in particular 49 U. S. C. A., Sections 2, 3(1) and 6(7). This advantage he cannot retain but must pay the legal rate on the shipments involved notwithstanding it may [38] appear as a distinct hardship on the shipper.

I therefore find for the plaintiff on two grounds:

1. That Item 503 has no application to the shipments involved for the reason no specified equipment was ordered by the defendant.
2. That the two smaller cars were furnished pursuant to an agreement between the parties, notwithstanding the fact that the plaintiff, through its agents may have lulled shipper into believing that he would have to pay only on the larger car.

Plaintiff is directed to submit expeditiously proposed findings of fact, conclusions of law and judgment for signature.

Dated: April 22, 1943.

BEN HARRISON

Judge

EXHIBIT "E".

In the District Court of the United States

Southern District of California

Central Division

No. 2384-BH

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, a corporation,

Plaintiff,

vs

DANIEL P. WHITE, an individual doing business as
GLOBE FREIGHT SERVICE,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF
LAW.

The above entitled cause came on regularly for trial on the 4th day of February, 1943, before the Court sitting without a jury, a jury trial having been waived by the respective parties, Jonathan C. Gibson, Esq., and William F. Brooks, Esq., appearing as attorneys for plaintiff, and Arthur H. Glanz, Esq., and Theodore W. Russell, Esq., appearing as attorneys for defendant.

Whereupon evidence was introduced by and on behalf of the respective parties, and the evidence being closed the cause was submitted to the Court for consideration and determination upon briefs filed by the respective parties, and the Court, after due consideration thereon finds in favor of the plaintiff and against the defendant. Daniel P. White, an individual doing business as Globe Freight Service, and makes the following Findings of Fact and Conclusions of Law, to-wit: [40]

FINDINGS OF FACT.

I

Plaintiff was and is a corporation organized and existing under and by virtue of the laws of the State of Kansas, engaged in the operation of a line of railway as a common carrier of freight and passengers between the points described in paragraph I of its complaint, and having its principal office in this State at Los Angeles, California.

II

Defendant Daniel P. White, an individual doing business as Globe Freight Service, is a resident of and is engaged in business in the City of Los Angeles, County of Los Angeles, State of California.

III

The so-called carrier's convenience rule is set forth in Item 503 of Trans-Continental Freight Bureau East-Bound Tariff No. 3-Series, I. C. C. 1431, which, so far as material, reads as follows:

"Except where specifically provided to the contrary in individual items of this tariff, carrier will furnish car of dimensions or weight carrying capacity ordered by shipper, but if carrier for its convenience furnishes car of different dimensions or weight carrying capacity, the following rules will govern. * * *

"When car of smaller dimensions or less weight carrying capacity is furnished, actual weight applies provided it is loaded to its full visible capacity or as heavily as loading conditions will permit: the balance of the shipment will be taken in another car at actual [41] weight and carload rate, and the entire

shipment will be subject to carload minimum weight applicable to the car of dimensions or weight carrying capacity ordered. (Subject to Notes 1 and 2)

* * * * *

IV

Between August 26, 1939, and February 11, 1941, the defendant made 118 carload shipments of machinery, metal auto parts and miscellaneous commodities, originating on the line of railway of plaintiff and transported over said line and the lines of its connecting railroads.

V

The parties have stipulated that the freight charges paid at the time of shipment are the lawfully applicable charges under the tariffs then in force, in the event that the Court shall find that the defendant ordered one 50 foot car and was furnished two 40 foot cars at carrier's convenience pursuant to the requirements of the so-called two for one rule, but that the higher freight charges demanded in the complaint are lawfully applicable in the event the Court shall find that two smaller cars were not lawfully and properly substituted for the larger car ordered by the defendant in compliance with said rule.

VI

Before any of the shipments moved, the plaintiff and the defendant entered into an agreement to the effect that the defendant could have two 40 foot cars in place of a 50 foot car ordered whenever he so desired.

VII

Before each shipment was made, the defendant advised carrier that he wanted to load an outgoing shipment on the day [42] in question, but did not place an order for a single 50 foot car.

VIII

Upon receipt of advice from the defendant that he wanted to load an outbound shipment, the plaintiff in each instance furnished the defendant two 40 foot cars.

IX.

In the case of each shipment, the plaintiff, upon receipt of the defendant's notice that he wished to load an outbound shipment, gave no consideration to the question of carrier's convenience, as required by the tariff, but furnished two 40 foot cars pursuant to the provisions of the arrangement between the parties.

X.

The shipment in each case was covered by a bill of lading, which was prepared by the defendant and then submitted to, signed and accepted by the plaintiff, and subsequently returned to defendant.

Each bill of lading carried a recital substantially to the effect that a 50 foot car was ordered by defendant and that two 40 foot cars were furnished at carrier's convenience. This recital was in error, in that there had been no order for a 50 foot car, and in that the two 40 foot cars were not furnished at carrier's convenience because the subject of carrier's convenience was not considered by the carrier.

XI.

Defendant had been engaged in the freight forwarding business for about 25 years, during which time he had occupied responsible positions and was and is generally familiar with the published tariffs, rates. rules and regulations. [43]

XII.

Both plaintiff and defendant were familiar with the provisions of the carrier's convenience rule set forth in Item 503.

XIII

The purpose of the understanding and arrangement between the parties and of the substitution of two 40 foot cars for a single 50 foot car, was in each instance to enable the defendant to use two 40 foot cars in shipping his goods at the same rates and charges applicable to a single 50 foot car, instead of at the higher charges applicable to two 40 foot cars.

XIV

The substitution of the two 40 foot cars was for the convenience of the defendant and was desired by him, because it furnished him 80 feet of space for loading instead of 50 feet, which was a distinct advantage to the defendant in loading his goods.

XV

The defendant in the case of each shipment paid charges applicable to a single 50 foot car. He did not pay the charges applicable to the two 40 foot cars actually used, although such charges were properly applicable under the lawfully published tariffs of the plaintiff and its connecting carriers then in full force and effect.

XVI.

Plaintiff carrier had on hand in its yards at Los Angeles, the point of origin of the 118 shipments, at all times involved in this suit a sufficient supply of 50 foot freight cars suitable for the handling of shipments of machinery

and [44] could and actually did supply such cars to defendant whenever he signified a real desire for them.

XVII

All of the 118 shipments sued upon herein were delivered by destination carriers within three years prior to the commencement of this action.

XVIII

The two for one rule is not applicable, and plaintiff is entitled to judgment in the amount of the difference between the lawfully applicable charges on the 118 shipments and the amount actually paid. The amount of such difference is \$19,685.58, and plaintiff is entitled to judgment for that amount, with interest at seven per cent (7%) per annum from the several dates of shipment to the date of payment.

CONCLUSIONS OF LAW

I

The carrier's convenience rule found in Item 503 of Trans-Continental Freight Bureau East-Bound Tariff No. 3 authorizes the substitution of two smaller cars in lieu of a larger one at the same minimum rate only where (1) the larger car is actually ordered and (2) carrier's convenience would be served by the substitution of two smaller cars.

II

The determination whether carrier's convenience requires the substitution of two smaller cars for a single large one is the sole responsibility of the carrier and completely within its control. The rule contem- [45] plates that the carrier shall exercise its own discretion and

make its own determination of the requirements of its convenience.

III

The shipper is not, under the rule, vested with any responsibility for the determination of carrier's convenience.

IV

Substitution is not authorized by the rule for shipper's convenience but only for carrier's convenience.

V

The word "convenience" is used in the rule to give the carrier wide discretion in the operating problems of meeting shippers' orders for varying types of equipment, but it is not intended to give free play to the carrier's will, pleasure, or mere whim; nor is it intended as a device for giving inducements to a shipper in soliciting his traffic or provide a loop hole for favoritism.

VI

Under the rule, a carrier, before substituting other equipment for a car ordered, must balance its operating advantages and disadvantages. The substitution can be made only when the car ordered is not readily available and it is not operatively advantageous for the carrier to furnish such car. The substitution is not otherwise justified.

VII

The two for one rule does not become operative and is not effectively invoked until the carrier has received from the shipper a genuine and specific order for a car of a particular [46] size. If no such order is received, there is no basis on which a substitution may be predicated.

VIII

Since under the facts no specific order for a single 50 foot car was placed, the two for one rule was not successfully invoked.

IX

Since under the facts the carrier did not exercise the discretion vested in it by the tariffs to determine the existence of carrier's convenience, and failure to exercise such discretion was known to both parties, the two for one rule was not successfully invoked.

X

The Interstate Commerce Act requires every common carrier by railroad subject to its provisions to publish and file tariffs containing rates, charges, rules and regulations applicable to the transportation of freight, requires absolute and inflexible observance of such tariffs, and forbids any deviation or departure, however accomplished, whether directly or indirectly by some subterfuge or device. Such tariffs have the force and effect of law.

XI

Any recital, agreement or other provision contained in any bill of lading or other contract of transportation between railroad and shipper that is in any way contrary to the published tariffs is null and void.

XII

It is the right and duty of a railroad, upon discovering the existence of an undercharge, to bring and main-

tain [47] suit for recovery, and the public policy in favor of the strict enforcement of published tariffs precludes the railroad from being estopped from recovering the full tariff charges by the provisions of any bill of lading or other contract to which it may have been a party, or by any of its previous conduct in relation to the transaction.

XIII

The two for one rule of Item 503 was not properly invoked and was not applicable in connection with the shipments in suit. Its application in the collection of freight charges by the plaintiff from the defendant resulted in a failure to collect the full tariff charges lawfully applicable for the service actually performed and to the equipment actually used.

XIV

Plaintiff is entitled to judgment for \$19,685.58, representing the undercharges on the 118 shipments moving within the period of limitations, with interest at seven per cent (7%) per annum from the several dates of shipment to the time of payment.

Dated at Los Angeles, California, this 18 day of June, 1943.

Ben Harrison
District Judge [48]

EXHIBIT "F".

In the District Court of the United States
Southern District of California

Central Division

No. 2384-BH

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, a corporation,
Plaintiff,

vs

DANIEL P. WHITE, an individual doing business as
GLOBE FREIGHT SERVICE,
Defendant.

JUDGMENT AFTER TRIAL BY COURT.

Appearances:

JONATHAN C. GIBSON, Esq.,
M. W. REED, Esq.,
L. W. BUTTERFIELD, Esq.,
WILLIAM F. BROOKS, Esq.,
448 Kerckhoff Building,
Los Angeles, California,
Attorneys for Plaintiff.

ARTHUR H. GLANZ, Esq.,
THEODORE W. RUSSELL, Esq.,
111 West Seventh Street,
Los Angeles, California,
Attorneys for Defendants.

The above entitled cause came on regularly for trial
on the 4th day of February, 1943, before the Court sitting

without a jury, [49] a jury trial having been waived by the respective parties; Jonathan C. Gibson, Esq., and William F. Brooks, Esq., appearing as attorneys for the plaintiff, and Arthur H. Glanz, Esq., and Theodore W. Russell, Esq., appearing as attorneys for the defendant.

Whereupon evidence was introduced by and on behalf of the respective parties, and the evidence being closed, the cause was submitted to the Court for consideration and determination on briefs of the respective parties, and after due deliberation thereon the Court files its Findings of Fact and Conclusions of Law, and orders judgment entered thereon in favor of plaintiff and against defendant Daniel P. White.

Wherefore, by reason of the law and findings aforesaid, it is Ordered, Adjudged and Decreed that plaintiff recover of the defendant Daniel P. White, the sum of \$19,685.58, with interest at the rate of seven per cent (7%) per annum from the date of each shipment to and including June 18, 1943, in the sum of \$3,923.39, and its costs of suit which are hereby taxed in the sum of \$47.14.

Dated: Los Angeles, California, June 18, 1943.

Ben Harrison
District Judge. [50]

EXHIBIT "G".

F. W. Turcotte

Attorney at Law

1004 Builders Exchange Bldg.

656 So. Los Angeles Street

Los Angeles

TRinity 5311

Attorney for Appellant

In the District Court of the United States
for the Southern District of California

Central Division

No. 2384 BH

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, a corporation,

Plaintiff,

vs.

DANIEL P. WHITE, an individual, doing business as
GLOBE FREIGHT SERVICE,

Defendant.

NOTICE OF APPEAL

Notice is hereby given that Daniel P. White, an individual, doing business as Globe Freight Service, the defendant above named, hereby appeals to the Circuit Court of Appeals for the 9th Circuit from the final judgment entered in this action on June 18, 1943.

F. W. Turcotte

Attorney for Appellant.

1004 Builders Exchange Building,

656 South Los Angeles Street,

Los Angeles, 14, California. [51]

EXHIBIT "H".

In the District Court of the United States
for the Southern District of California

Central Division

No. 2384 BH

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, a corporation,

Plaintiff,

vs.

DANIEL P. WHITE, an individual, doing business as
GLOBE FREIGHT SERVICE,

Defendant.

STIPULATION EXTENDING TIME TO FILE
RECORD

It is hereby stipulated, subject to the approval of the Court, that the time within which the transcript of record shall be filed in the United States Circuit Court of Appeals for the 9th Circuit shall be extended to and including June 8, 1944.

Notice by the Clerk is hereby waived.

F. W. TURCOTTE

Attorney for Defendant-Appellant

JONATHAN C. GIBSON

WILLIAM F. BROOKS

Attorney for Plaintiff-Appellee. [52]

EXHIBIT "I".

In the District Court of the United States
for the Southern District of California

Central Division

No. 2384 BH

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, a corporation,
Plaintiff,

vs.

DANIEL P. WHITE, an individual, doing business as
GLOBE FREIGHT SERVICE,
Defendant.

ORDER EXTENDING TIME TO FILE RECORD

Pursuant to stipulation filed herein, it is ordered that the time within which the transcript of record shall be filed in the United States Circuit Court of Appeals for the 9th Circuit shall be and hereby is extended to and including June 8, 1944.

Dated: April 25, 1944.

BEN HARRISON
Judge.

[Endorsed]: Filed Jun. 6, 1944 Edmund L. Smith,
Clerk By John A. Childress, Deputy Clerk [53]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK.

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 53 inclusive contain the original Agreed Statement of Case on Appeal, Pursuant to Rule 76 of the Federal Rules of Civil Procedure which constitutes the record on appeal to the Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for certifying the foregoing record amount to \$1.85 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 6th day of June, 1944.

(Seal)

EDMUND L. SMITH,

Clerk

By Theodore Hocke

Deputy Clerk.

[Endorsed]: No. 10791. United States Circuit Court of Appeals for the Ninth Circuit. Daniel P. White, an individual doing business as Globe Freight Service. Appellant, vs. The Atchison, Topeka and Santa Fe Railway Company, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California. Central Division.

Filed June 8, 1944.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

Before the United States Circuit Court of Appeals for
the Ninth Circuit

No. 10791

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY, a corporation,

Plaintiff and Appellee,

vs.

DANIEL P. WHITE, an individual, doing business as
GLOBE FREIGHT SERVICE,

Defendant and Appellant.

STATEMENT OF POINTS RELIED ON BY
APPELLANT.

Comes now Daniel P. White, an individual, doing business as Globe Freight Service, the appellant in the above-entitled cause, and states that the points upon which he intends to rely in this Court in this case are as follows:

I

Section 419, Part IV of the Interstate Commerce Act bars recovery by rail carriers subject to Part I of the Interstate Commerce Act of undercharges growing out of the transportation of goods for freight forwarders prior to May 16, 1942.

II

Section 419 of Part IV of the Interstate Commerce Act grants immunity to freight forwarders from alleged undercharges claimed by rail carriers subject to Part I of the Interstate Commerce Act for transportation performed by said rail carriers for freight forwarders prior to May 16, 1942.

III

Section 419 of Part IV of the Interstate Commerce Act bars the plaintiff and appellee from recovery of the alleged undercharges.

Dated June 5, 1944.

F. W. Turcotte
Counsel for Appellant.

[Endorsed]: Filed Jun. 8, 1944. Paul P. O'Brien,
clerk.

[Title of Circuit Court and Cause.]

DESIGNATION OF RECORD FOR PRINTING.

Comes now Daniel P. White, an individual, doing business as Globe Freight Service, the Appellant in the above entitled cause, and designates the whole of the record, as filed in this Court, to be printed.

Dated June 6, 1944.

F. W. Turcotte
Attorney for Appellant.

[Endorsed]: Filed Jun. 8, 1944. Paul P. O'Brien,
clerk.

No. 10791.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

DANIEL P. WHITE, an individual doing business as
GLOBE FREIGHT SERVICE,

Appellant,

vs.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COM-
PANY, a corporation,

Appellee.

BRIEF OF APPELLANT.

F. W. TURCOTTE,
1004 Builders Exchange Building, Los Angeles 14,

Attorney for ~~Appellant~~

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No. 10791.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

DANIEL P. WHITE, an individual doing business as
GLOBE FREIGHT SERVICE,

Appellant,

vs.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COM-
PANY, a corporation,

Appellee.

BRIEF OF APPELLANT.

I.

Official Report of Opinion Below.

The opinion of the District Court of the Southern District of California, Central Division, in this case is reported in 49 F. Supp. 797.

II.

Jurisdiction.

The instant action was commenced in the United States District Court in and for the Southern District of California, Central Division, to recover alleged freight undercharges under Section 6 (7), Part I, of the Interstate Commerce Act on various shipments made by appellant as a freight forwarder from Los Angeles, California, over

the line and system of transportation of appellee and its connecting carriers to destinations in the States of Illinois, Indiana, Ohio, Michigan and Pennsylvania; as such is an action arising under a law regulating commerce, the District Court had jurisdiction thereof. (*Jud. Code*, Sec. 24 (8), (28 U. S. C. 41 (8).) Within the period allowed by law after the entry of judgment by the District Court, the appellant made a motion for a new trial, which was denied by the District Court on the 28th day of December, 1943 [R. 10]. Within ninety days after the denial of appellant's motion for a new trial, appellant served on appellee and filed with the Clerk of the District Court a notice of appeal [R. 11]. By order of the District Court, the time within which the transcript of record should be filed in the United States Circuit Court of Appeals for the Ninth Circuit was extended to and including June 8, 1944 [R. 38], and the appeal is properly before this Court.

Jurisdiction of this Court is invoked under *Judicial Code*, Section 128 (28 U. S. C. 225).

III.

Statement of the Case.

The appellee, a common carrier by railroad of goods moving in interstate commerce, commenced this action against appellant, a freight forwarder of goods moving in interstate commerce, for the recovery of the differences between the transportation charges paid by appellant pursuant to his agreement with appellee [R. 18], and those which accrued under the tariffs published by the appellee and its connecting carriers [Exhibit "A," R. 8-12], and on file with the Interstate Commerce Commission, on numerous shipments of machinery, metal auto parts and mis-

cellaneous commodities [R. 7-8], shipped from Los Angeles, California, to Chicago, Ill., South Bend and Indianapolis, Indiana, Canton and Cleveland, Ohio, Detroit, Mich., and Essington, Pa. [R. 3], during the period from August, 1939, to February, 1941 [R. 15-16].

Appellant during all of the period involved and since April, 1937, has conducted a freight forwarding business. He was engaged in the undertaking of collecting at his terminal at Los Angeles parcels of freight from various shippers throughout the State of California and consolidating same into carload lots and then shipping said quantities to his other terminals where they were distributed locally in smaller lots; he engaged the services of appellee and connecting carriers to perform the scheduled transportation between the terminal centers. He maintains terminals at Los Angeles, California; Chicago, Illinois; Cincinnati and Cleveland, Ohio; Detroit, Michigan; Milwaukee, Wisconsin; and New York, New York. Through solicitation and advertising he held out to the public a complete service of transportation of small shipments of various commodities of accepted freight for transportation from store door to store door, issuing bills of lading in his name and assuming responsibility for the safe delivery of the goods. For this service he collected freight charges from each of his customers in sufficient amount to cover all of the transportation services rendered, including the charges which he in turn paid to appellee and other common carriers actually transporting the goods.

In each of the causes of action involved appellee, as the common carrier, collected from appellant, as a shipper, the freight charges which would accrue under rates published in the carrier's applicable tariffs for shipments actually

made in two 40-foot cars but which were supplied, at carrier's convenience, in lieu of one 50-foot car ordered by the shipper for the accommodation of each such shipment. All of said shipments moved under uniform straight bills of lading [R. 7 and Exhibit "C"]. On each such bill of lading appeared the notation "One 50-foot car ordered; 2 smaller cars furnished by R.R." [R. 7 and Exhibit "C"]. And the appellee on each of the freight waybills prepared by it covering said shipments made the following notation "One fifty-foot car ordered, two smaller cars furnished account carrier's convenience." [R. 5-6, Exhibit "A," page 2, and Exhibit "B," page 2]. However, prior to the making of the shipments involved, it was agreed and understood by and between appellant and appellee that appellant preferred the use of two 40-foot cars instead of one 50-foot car and that appellee would furnish appellant two 40-foot cars in lieu of a 50-foot car and assess the charges on the assumption that a 50-foot car had been ordered and two 40-foot cars furnished at carrier's convenience [R. 8, 17-18, 27, 28, 29]; and the appellee furnished the two 40-foot cars to appellant pursuant to this arrangement [R. 28]. The purpose of the appellant and appellee in having such understanding and arrangement was to enable the appellant to use two 40-foot cars in shipping his goods at the same rates and charges as were contemporaneously applicable to a like shipment made in a single 50-foot car, instead of at the higher charges applicable to a shipment made in two 40-foot cars [R. 29].

This action is predicated upon the theory, and the trial court has in effect concluded, that the arrangement by the appellant and appellee to have the use of two 40-foot cars

at the same rate which would be applicable for one 50-foot car was not a *bona fide* substitution of two for one, made for the convenience of the carrier, but on the contrary was an unlawful agreement between the carrier and the shipper to charge and collect a lower rate than was contemplated and required by the applicable provisions of appellee's published tariff. The difference between the amount contracted for and actually paid by the shipper and the amount which the trial court determined to be due under the applicable tariff rates represents an undercharge in the sum of \$19,685.58, for payment of which judgment was given by the trial court.

IV.

Points Relied Upon.

1. Section 419, Part IV, of the Interstate Commerce Act (U. S. Code, Title 49, Chapter 13, Sec. 1019), bars recovery by rail carriers subject to Part I of the Interstate Commerce Act (U. S. Code, Title 49, Chapter 1) of undercharges growing out of the transportation of freight forwarder shipments prior to May 16, 1942.

2. Section 419 of Part IV of the Interstate Commerce Act (U. S. Code, Title 49, Chapter 13, Sec. 1019) grants immunity to freight forwarders from alleged undercharges claimed by rail carriers subject to Part I of the Interstate Commerce Act (U. S. Code, Title 49, Chapter 1) for transportation performed by said rail carriers of freight forwarder shipments for freight forwarders prior to May 16, 1942.

3. Section 419, Part IV, of the Interstate Commerce Act (U. S. Code, Title 49, Chapter 13, Sec. 1019) bars the appellee from recovery of the alleged undercharges.

V.
ARGUMENT.

Summary of Argument.

Point A. The cause of action herein is predicated upon special statutory authority, to-wit, Section 6 (7), Part I of the Interstate Commerce Act (49 U. S. Code, Section 6 (7)), which in substance and effect prohibits special contractual arrangements between the carriers and shippers resulting in the payment of rates different from those contained in the carriers' tariffs.

Point B. A right of action based upon statute may be abolished by the Legislature even though such right has accrued; and voluntary transactions between parties which were invalid or illegal by reason of statutory provisions may be validated by the Legislature through later enactments.

Point C. Congress by enacting Section 419 of Part IV of the Interstate Commerce Act (effective May 16, 1942), abolished the right of action, which appellee had prior to such enactment, to collect the undercharges here involved; and in substance and effect, validated the voluntary agreement and arrangement between appellant and appellee for the collection of transportation charges at rates different from those provided in appellee's published tariffs.

Point A.

The cause of action herein is predicated upon special statutory authority, to-wit, Section 6 (7), Part I of the Interstate Commerce Act (49 U. S. Code, Section 6 (7)), which in substance and effect prohibits special contractual arrangements between the carriers and shippers resulting

in the payment of rates different from those contained in the carriers' tariffs.

Section 6 (7) of the Interstate Commerce Act (U. S. Code, Title 49, Chapter 1, Section 6 (7)) regulating rail carriers engaged in interstate commerce, at all times during the transportation of the instant shipments provided as follows:

“Sec. 6 (7). No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares and charges so specified, nor extend to any shipper or person any privilege or facility in the transportation of passengers or property, except such as are specified in such tariffs.”

Prior to the enactment of the Interstate Commerce Act, carriers were free to make such rates on interstate transportation as they saw fit, subject only to the power of the courts under the common law, at the suit of individuals, to prevent irreparable damage or give redress for unreasonable or unjust discriminatory rates. (*Texas P. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 51 L. Ed.

553, 27 Sup. Ct. 350.) In the absence of statutory enactment, such as the Interstate Commerce Act, carriers were not required to charge and collect for their transportation service in strict accordance with published tariffs. Within the broad limits recognized under the common law that rates should not be unreasonable, a common carrier, such as appellee, could lawfully enter into the type of arrangement which it had with appellant in this case for supplying two 40-foot cars in lieu of and at the same rates as those charged for a single 50-foot car.

Appellant in collecting small shipments of goods, consolidating them and reshipping them in bulk, using only the transportation facilities of others, including appellee, was a shipper. (*Lehigh Valley R. R. Co. v. United States*, 243 U. S. 444, 37 S. Ct. 434, 61 L. Ed. 839; *Great Northern Ry. v. O'Connor*, 232 U. S. 508, 34 S. Ct. 380, 58 L. Ed. 703.) Regardless of the relation that may have existed between appellant as freight forwarder and his own customers, he was not a common carrier, but a shipper, in his relations with the rail carriers whose facilities he employed. (*Acme Fast Freight, Inc., et al. v. United States, et al.*, 30 F. Supp. 968, affirmed in 309 U. S. 638, 60 S. Ct. 810.) Being merely a shipper in his dealings with appellee, it is clear that under the provisions of Section 6 (7) of the Interstate Commerce Act, above quoted, the only freight charges lawfully applicable to the transportation service performed by appellee were those determined by the rates as contained in appellee's published tariffs. Appellee's suit is therefore predicated upon the statutory requirement imposed by Section 6 (7) of the Interstate Commerce Act above quoted, under which appellee seeks to collect \$19,685.58 as undercharges represent-

ing the difference between the transportation charges originally collected and those which accrued under the published tariff rate.

Point B.

A right of action based upon statute may be abolished by the Legislature even though such right has accrued; and voluntary transactions between parties which were invalid or illegal by reason of statutory provisions may be validated by the Legislature through later enactments.

If a statute giving a special remedy is repealed without a saving clause in favor of pending suits, all suits must stop where the repeal finds them and if final relief has not been obtained before the repeal becomes effective, it cannot be granted thereafter, and the repeal deprives the Court of jurisdiction of the subject matter. (*National Carloading Corp. v. Phoenix-El Paso Express, Inc.* (Texas Supreme Court), 176 S. W. (2d) 564; Certiorari denied by United States Supreme Court, 64 S. Ct. 1156.)

Rights of action based on purely statutory grounds may be abolished by Congress even after they have accrued. (*Ewell v. Daggs*, 108 U. S. 143, 2 S. C. 408, 27 L. Ed. 682; *Hazzard v. Alexander*, 36 Del. 212, 173 Atl. 517; *Wilson v. Head*, 184 Mass. 515, 69 N. E. 317; *National Carloading Corp. v. Phoenix-El Paso Express, Inc.* (Texas), 176 S. W. (2d) 564.)

The authority of Congress to validate voluntary transactions between parties which at the time they were entered into were by statute invalid or illegal has been upheld by the United States Supreme Court. (*West Side R. R. v. Pittsburg Construction Co.*, 219 U. S. 92, 31 S. C. 196, 55 L. Ed. 107; *McNair v. Knott*, 302 U. S.

369, 372, 58 S. C. 245. 82 L. Ed. 307; and in *National Carloading Corp. v. Phoenix-El Paso Express, Inc.* (Texas), 176 S. W. (2d) 564.)

The appellee did not possess such a vested right as to come within the inhibition of the Fifth Amendment to the Constitution of the United States. Such a right must be something more than a mere expectation based upon an anticipated continuance of the existing law. If before rights become vested in particular individuals, the convenience of the state induces amendment or repeal of the laws upon which they are based, these individuals are left without any remedy at law to enforce their claims. If final relief has not been granted before the repeal goes into effect, it cannot be granted thereafter. When the law is amended or repealed without a saving clause, it is considered, except as to transactions passed and closed, as though it had never existed. (*National Carloading Corp. v. Phoenix-El Paso Express, Inc.* (Texas), 176 S. W. (2d) 564.)

Point C.

Congress, by enacting Section 419 of Part IV of the Interstate Commerce Act (effective May 16, 1942), abolished the right of action, which appellee had prior to such enactment, to collect the undercharges here involved; and in substance and effect, validated the voluntary agreement and arrangement between appellant and appellee for the collection of transportation charges at rates different from those provided in appellee's published tariffs.

Part IV of the Interstate Commerce Act (U. S. Code, Title 49, Chapter 13, Sections 1001 to 1022, inclusive) deals extensively with the operations of freight forward-

ers and regulates their activities in general, including their duties, powers, permits, rates, charges, accounts, records, reports, liabilities and practices. By its enactment May 16, 1942, freight forwarders as a class were brought under regulation by the Interstate Commerce Commission. Prior thereto they had not been recognized by the Commission or courts as carriers theretofore made subject to the jurisdiction of the Interstate Commerce Commission. In this connection it will be noted that the Interstate Commerce Act in its present form comprises four parts. Part I deals with rail carriers and was originally enacted February 4, 1887 (U. S. Code, Title 49, Chapter 1). Part II, enacted August 9, 1935, relates to motor carriers and is generally known as Motor Carrier Act 1935 (U. S. Code, Title 49, Chapter 8). Part III, enacted September 18, 1940, deals with the regulation of water carriers (U. S. Code, Title 49, Chapter 12). Part IV, enacted May 16, 1942, relates to freight forwarders.

Section 419 of Part IV of the Act limits and restricts the liability of the freight forwarders for past acts and omissions. Appellant interposes such section as a complete defense to this action and relies thereon for the reversal of the judgment rendered by the lower court. This section reads as follows:

“No person shall be subject to any punishment or liability under the provisions of this chapter and chapters 1, 8 and 12 of this title on account of any act done or omitted to be done, prior to the effective date of this chapter, in connection with the establish-

ment, charging, collection, receipt, or payment of rates of freight forwarders, or joint rates or divisions between freight forwarders and common carriers by motor vehicle subject to this chapter and chapters 1, 8 and 12 of this title.”

It is to be noted that the foregoing section provides in effect, that no person (including a freight forwarder) shall be subject to any liability under the provisions of Parts I, II, III and IV of the Interstate Commerce Act (U. S. Code, Title 49, Chapters 1, 8, 12, 13) on account of any act done or omitted to be done prior to May 16, 1942, in connection with the establishment or payment of rates of freight forwarders. The provisions of this section are clearly made retroactive. The immunity granted extends to liability for “any act done or omitted to be done, *prior to the effective date of this chapter*, in connection with the establishment, charging, collection, receipt, or payment of rates of freight forwarders.” (Emphasis supplied.) No more explicit language could have been used to indicate the legislative intent that the provision should have a retroactive effect. *National Carloading Corp. v. Phoenix-El Paso Express, Inc.* (Texas), 176 S. W. (2d) 564.

The question here presented is whether under proper construction of the foregoing statutory language appellant as a freight forwarder was granted immunity from liability on account of the alleged undercharges here involved. An affirmative answer to this question depends upon the construction and meaning of the phrase “or payment of rates of freight forwarders” as used therein. Appellant respectfully contends that this language as used by Congress refers to rates accorded the freight forwarder by rail carriers subject to Part I of the Interstate

Commerce Act and therefore includes the subject matter of this action. This contention is supported by the fact that prior to the enactment of Section 419, Part IV, of the Interstate Commerce Act, containing the immunity clause, there were no "rates of freight forwarders" filed with the Interstate Commerce Commission and subject to its regulation under Part I of the Act, except such rates as were filed by rail carriers subject to Part I of the Act and made effective as to shipments of freight forwarders and of all other shippers. Such lawfully filed and published rates were as much the "rates of" the shipper as they were "rates of" the carrier. In this sense the only rates of freight forwarders of which the law took cognizance and over which the Interstate Commerce Commission exercised any regulatory authority whatever under Part I of the Interstate Commerce Act were those rates which had been set up from time to time by the rail carriers for the transportation of shipments of freight forwarders.

It is a fundamental rule of statutory construction that every word and phrase must, if possible, be given a meaning consistent with the general language and tenor of the enactment and as between its possible construction, that which gives meaning to all parts of the enactment must be preferred over one which renders any part meaningless. In the enactment of Section 419, Congress definitely included under the immunity thereby granted, liability for rates payable under Part I. This liability is further specified as the liability for rates of "freight forwarders." The only rates of "freight forwarders" recognized under Part I are, as above stated, the rates of rail carriers (and of freight forwarders) applicable to ship-

ments of freight forwarders over the lines of rail carriers. Therefore, unless the language is so construed that the phrase "rates of freight forwarders" refers to and means these rates applicable to the shipments of freight forwarders over the lines of rail carriers subject to Part I, the phrase would become meaningless and of no force whatever.

This view is strengthened by the report of the Committee on Interstate and Foreign Commerce as shown by House Report No. 1172, 77th Congress, 1st Session. On page 18 of such report, with reference to Section 419 regarding liability for past acts and omissions we find, among other things, this language:

"This section relieves freight forwarders, common carriers by motor vehicles, and other persons from penalties and liabilities under the Interstate Commerce Act or any other Federal statute on account of anything done or omitted to be done prior to the enactment of Part IV in connection with the establishment, charging, collection, receipt or payment of rates of freight forwarders, or joint rates or divisions between freight forwarders and common carriers by motor vehicle subject to Part II.

"Common law and contractual rights, remedies and liabilities are not affected by this provision.

"The validity of this section, in so far as it relieves persons of liability to fines, penalties and forfeitures running to the United States is beyond doubt, and in so far as it relieves persons of liability to individuals, good authority exists for such action.

"The courts are generally agreed that rights of action based upon purely statutory grounds may be abolished by the legislature even after they have ac-

crued. (16 G. J. S. Constitutional Law, Sec. 254; *Ewell v. Daggs*, 108 U. S. 143 (1883); *Hazzard v. Alexander*, 36 Del. 212, 173 Atl. 517 (1934); *Wilson v. Head*, 184 Mass. 515, 69 N. E. 317 (1904); cf. *Carson v. Gore-Meenan*, 229 Fed. 765, 767 (1916). The courts have been particularly uniform in reaching this conclusion where the right of action is in the nature of a claim by an individual for the recovery of a statutory fine, penalty or forfeiture (*Ewell v. Daggs*, 108 U. S. 143 (1883); *Lemon v. Los Angeles Terminal Co.*, 38 C. A. (2) 659, 109 P. (2) 387 (1940); *Anderson v. Byrnes*, 122 Calif. 272, 54 P. 821 (1898); *Denver & R. G. Ry. Co. v. Crawford*, 11 Col. 598, 19 P. 673, 674 (1888). The authority of Congress or a state legislature to validate voluntary transactions between parties which at the time they were entered into were by statute invalid or illegal has been upheld by the United States Supreme Court in several cases (*West Side R. R. v. Pittsburg Construction Co.*, 219 U. S. 92 (1910); *McNair v. Knott*, 302 U. S. 369, 372 (1937)."

The word "liability" as employed in Section 419, applies to civil as well as criminal liability. (*National Car-loading Corporation v. Phoenix-El Paso Express, Inc.* (Texas), 178 S. W. (2d) 133, 137-138.)

Conclusion.

Appellant respectfully submits that the Court should reverse the decision of the District Court and that judgment should be granted in favor of the appellant and against the appellee.

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Attorney for Appellant.

No. 10791

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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FREIGHT SERVICE,

Appellant,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COM-
PANY, a corporation,

Appellee.

BRIEF OF APPELLEE.

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THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COM-
PANY, a corporation,

Appellee.

BRIEF OF APPELLEE.

Question Presented.

There is in reality but a single question presented on this appeal, namely whether the courts have been deprived of jurisdiction of an action by a railroad against a forwarder to recover undercharges of the rates of the railroad by Section 419 of Part IV of the Interstate Commerce Act, 49 U. S. C. A. 1019.

This question was not seriously presented or considered in the lower court. Quite true there was a passing mention of the subject during the course of argument on

motion for a new trial when counsel for the unsuccessful defendant in a similar action, whose motion for a new trial was being argued at the same time, referred to Section 419 as having a possible bearing on the right of the railroad to maintain a suit for undercharges, but made no firm contention that the section was governing. Otherwise, the question now being presented here for review was not presented for decision,¹ and the District Court made no specific findings of fact or conclusions of law on the subject. (R. 12) The Court quite evidently considered the point too flimsy for serious consideration.

Aside from the assignments attacking the jurisdiction of the Court, no error is assigned in any of the findings of fact or conclusions of law below, and it is conceded that if the District Court had jurisdiction of the cause of action, its judgment must be affirmed.

¹In fairness it should be noted that Appellant's present Counsel was not in the case at the time and did not participate in this or in any other proceeding below except in connection with the present appeal.

ARGUMENT.

I.

Section 419 Shows on Its Face That It Does Not Affect the Jurisdiction of Suits for Undercharges of a Railroad.

The present suit is for the collection of undercharges in the rates of a railroad. The contention of the appellant is that the District Court was deprived of jurisdiction over such a suit by Section 419.

As set out in the United States Code this section reads as follows:

“No person shall be subject to any punishment or liability under the provisions of this chapter and chapters 1, 8, and 12 of this title on account of any act done or omitted to be done, prior to the effective date of this chapter, in connection with the establishment, charging, collection, receipt, or payment of rates of freight forwarders, or joint rates or divisions between freight forwarders and common carriers by motor vehicle subject to this chapter and chapters 1, 8, and 12 of this title.” (49 U. S. C. A. 1019.)

The appellant makes no contention that the present suit involves joint rates or divisions between freight forwarders and common carriers by motor vehicle. It confines its contention to the single proposition that the suit is for the collection of rates of freight forwarders growing out of shipments moving prior to the passage of the statute and is therefore one of which the Courts have been deprived of jurisdiction. The phrase “rates of

freight forwarders," the appellant contends, means not the rates charged by such forwarders for their service to patrons, but the rates paid by such forwarders to rail carriers subject to Part I of the Interstate Commerce Act for the transportation of freight of a forwarder. Such rates, it says, were as much the rates of the shipper as they were rates of the carrier, as much the rates of the forwarder as the rates of the railroad.

Appellant argues that prior to the enactment of Section 419 there were no rates of freight forwarders filed with the Interstate Commerce Commission and subject to its regulation under Part I of the Act except such rates as were filed by rail carriers and made effective as to shipments of freight forwarders as well as of other shippers. Apparently appellant contends that the phrase "rates of freight forwarders" is modified by the concluding phrase of Section 419 reading "subject to this chapter and chapters 1, 8, and 12 of this title" and the provision is to be read as if it granted immunity for things done in connection with freight forwarder rates subject to this chapter and chapters 1, 8 and 12 of this title, or, what amounts to the same thing, "subject to Parts I, II, III, and IV of the Interstate Commerce Act."

Appellant stresses the fact that since railroad rates are the only rates subject to Part I, and since all of the language of Section 419 must be given effect, the term "rates of freight forwarders" must, as there used, mean those rates applicable to the shipments of freight forwarders over the lines of rail carriers subject to Part I, since there is nothing else it could mean.

But the concluding phrase of Section 419 really means nothing more than "subject to the Interstate Commerce

Act” because that act consists of Parts I, II, III, and IV, which in turn consist of Chapters 1, 8, 12 and 13 of Title 49 of the United States Code. This is borne out by the version of Section 419 as set forth in the official print of the statute as passed by Congress and signed by the President, Public Law 558, 77th Congress, Chapter 318, Second Session, 56 Stat. 298, which agrees word for word with the section as set forth in Supplement to the Interstate Commerce Act Revised to August 7, 1942, United States Government Printing Office, Washington, 1942. In both of these places Section 419 reads as follows:

“Section 419. No person shall be subject to any punishment or liability under the provisions of this Act on account of any act done or omitted to be done, prior to the effective date of this part, in connection with the establishment, charging, collection, receipt, or payment of rates of freight forwarders, or joint rates or divisions between freight forwarders and common carriers by motor vehicle subject to this Act.”

The phrase “subject to this act” or “subject to this chapter and chapters 1, 8 and 12 of this title” follows immediately after the phrase “common carriers by motor vehicle.” The general rule is that in construing a statute, qualifying words, phrases, or clauses are ordinarily confined to the last antecedent or to the words and phrases immediately preceding. *Puget Sound Elec. Ry. v. Benson*, 9 Cir., 253 Fed. 710; 50 *Amer. Juris.* 258. Force is lent to this construction where, as here, the two phrases are not separated by a comma. *Porto Rico Ry. etc. Co. v. Mor*, 253 U. S. 345, 64 L. Ed. 944; 50 *Amer. Juris.* 259.

While these rules of construction are not controlling in all cases, they do apply where, as here, there is nothing in the statute or in the surrounding circumstances requiring a different view. In the instant case, to regard the phrase "subject to this act" as referring to the preceding phrase, "common carriers by motor vehicle" is to accept the natural and logical meaning of the words employed, and to avoid the strained construction which would torture the term "rates of freight forwarders" into meaning the rates of other persons—the rates of railroads.

The construction placed upon the statute by the appellant does violence to the language employed. The preposition "of" in its most general sense means "proceeding from, belonging to, relating to, connected with, concerning." One of its more special senses is "indicating origin, source, or the like: thus * * * from as possessor, giver, seller, loser, etc." (Webster's New International Dictionary, 2d Edition, Unabridged.)

The prices of the butcher, the baker, and the candlestick maker are those for which they sell their wares, not those for which they procure supplies from others. The fees of a lawyer are what he charges his clients for legal services, not what he pays to other professional men when he has occasion to seek their services. The rates of a gas company, an electric light company or a water company, are the charges made by each of these utilities to its patrons, not what it pays to the other utilities for some commodity or service. So the rates of a railroad are the charges to its shippers, whether they be forwarders or other persons. So also the rates of freight forwarders are the charges they make to those who use their services. This is the plain literal meaning of the words of common speech employed in the statute.

It is an interpretation which is supported by the principle of *noscitur a sociis*. The section consists of a single sentence giving immunity for things done in connection with "rate of freight forwarders, or joint rates or divisions between freight forwarders and common carriers by motor vehicle." Joint rates between freight forwarders and common carriers by motor vehicle are the charges made to their patrons for joint service, for transportation in which both the forwarder and the motor carrier participate under an agreement naming a single rate to be exacted from shippers. Similarly, divisions between freight forwarders and common carriers by motor vehicle represent a distribution of the proceeds of the joint charges made to patrons. None of the terms deal with what the forwarders or motor carriers pay for the goods or services that they buy. They are all confined to charges made to patrons or a division of the resulting proceeds.

This interpretation is likewise supported by the circumstance that in other sections of Part IV of the act closely similar phrases are used in the same sense, and as denoting charges made by forwarders against their patrons. For example, it is provided "*All of rates and charges of freight forwarders* for service subject to this part shall be stated in lawful money of the United States." Section 405 (b). "In any proceeding to determine the justness or reasonableness of any *rate or charge of any freight forwarder*, for service subject to this part, there shall not be taken in consideration or allowed as evidence or elements of value of the property of such forwarder either goodwill, earning power, or the permit under which such forwarder is operating." Section 406 (c). "In the exer-

cise of its power to prescribe just and reasonable *rates and charges of freight forwarders* * * * the Commission shall give due consideration * * * to the inherent nature or freight forwarding * * *.” Section 406 (d). “Whenever in any investigation under this part * * * there shall be brought in issue *any rate, charge, classification, regulation, or practice of any freight forwarder*, made or imposed by authority of any State, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified * * *.” Section 406 (f). (Italics ours.)

In all of these passages the words “rates or charges of freight forwarders” or the closely similar terms employed are quite obviously used in the sense of rates or charges exacted from the public by the forwarders. Since the general rule requires that words used in one place in legislative enactments should be regarded as having the same meaning in other places in the statute, it is reasonable to conclude that the term “rates of freight forwarders” in section 419 has reference to the charges made to patrons, rather than to payments made by forwarders to other persons. *Pampanga Sugar Mills v. Trinidad*, 279 U. S. 211, 73 L. Ed. 665; 50 *Amer. Juris.* 259.

The statute on its face, therefore, must be regarded as conferring immunity only with respect to the rates which forwarders charged their patrons prior to the effective date of Section 419. It cannot, consistently with the literal meaning of its definitely plain and unambiguous terms, be construed as in any way affecting a suit such as the one at bar, for the collection of undercharges in the rates of a common carrier by railroad, even where those rates have been exacted for transportation service performed by the railroad for a forwarder.

II.

**The Legislative History of Section 419 Demonstrates
That It Does Not Affect Suits for Collection of
Rates of Railroads.**

The appellant contends that its construction of Section 419 is supported by the legislative history of the statute. He describes the situation of forwarders before and after enactment of the statute, and he quotes from House Report No. 1172, 77th Congress, First Session, one of the Committee reports on the bill.

But the legislative history of Section 419 affords no support for the position of the appellant. On the contrary, it shows that the section was enacted for the specifically limited purpose of affording relief from liability in connection with the establishment, collection, etc., of the rates charged by freight forwarders to their patrons and joint rates or divisions between freight forwarders and common carriers by motor vehicle subject to the Interstate Commerce Act. It shows that Congress had not the slightest intention of affecting the jurisdiction of the courts over suits to collect undercharges in the rates of railroads whether filed against forwarders or other users of rail service.

The purpose of Section 419, as expressly stated in committee reports on the bill, was to relieve freight forwarders and connecting common carriers by motor vehicle from the consequences of far-reaching irregularities in connection with their charges to the public and in connection with the division of these charges between them which occurred between the passage of Part II of the Interstate Commerce Act in 1935, and the passage of Part IV in 1942. No irregularities in the payment by

forwarders for rail service were brought to the attention of Congress, and there is not the slightest indication anywhere in the legislative history of Section 419 of an intention on the part of Congress to relieve forwarders of the payment of railroad undercharges.

The business of freight forwarders is to collect small shipments of goods, consolidate them and then re-ship them in bulk over the lines of other common carriers—by railroad, by water, and by motor vehicle. When they use the services of rail or water carriers, they pay the regularly published tariff rates just as any other shipper. In their railroad operations their opportunity for profit is derived from the spread between the carload rates under which they ship and the less than carload rates which their patrons would have to pay if they tendered their shipments directly to the railroads. The forwarders attract patronage by offering rates lower than the less than carload but higher than the carload rates of the railroad. In their water carrier operations an analogous situation obtains. In the highway transportation field, the arrangements of forwarders with the motor carriers have had a checkered history in recent years.

Before the passage of the Motor Carrier Act of 1935, Part II of the Interstate Commerce Act (49 U. S. C. A. 301-327), the amount of compensation paid by forwarders to motor carriers for transporting freight was determined by private contract. The Motor Carrier Act required carriers subject to regulation to file tariffs with the Interstate Commerce Commission, directed the rates named in such tariffs to be strictly observed, and prohibited any deviation therefrom under severe penalties. The new legislation made it impossible for a motor carrier subject to the Act to continue the former practice of entering

into private contracts governing the rates at which they would transport forwarder traffic. The forwarders, however, concluding that they were common carriers subject to the Act, filed their tariffs with the Commission and entered into agreements with various motor carriers subject to the Act for the division of joint rates as set forth in the tariffs. The motor carriers, acquiescing in this view, quite generally filed with the Commission concurrences in the forwarder tariffs.

These arrangements, however, were upset by the decision of the Interstate Commerce Commission in *Acme Fast Freight, Inc., et al*, 2 M. C. C. 415 (1937), 8 M. C. C. 211 (1938), 17 M. C. C. 549 (1939), that forwarders were not subject to the Motor Carrier Act of 1935, and that they did not have the right to file tariffs with the Commission or to enter into joint rates with motor carriers subject to the Act. The Commission ordered stricken from its files the tariffs thus found to be illegal. The decision of the Commission was upheld by a three-judge court in *Acme Fast Freight v. United States* (1940), 30 Fed. Supp. 968, and the decision was affirmed by the Supreme Court in *Acme Fast Freight v. United States* (1940) 309 U. S. 638, 60 S.Ct. 810, 84 L. Ed. 993. The Commission rendered similar decisions in other cases. In all of such cases, however, it postponed the effective date of the orders from time to time to permit those affected to seek relief.

These decisions were a serious blow to the forwarders and to the common carriers by motor vehicle subject to the Act who had maintained joint rates with the forwarders. Both groups of carriers were exposed to severe liabilities, civil and criminal. The forwarders had

established, published and collected from their patrons rates under an unauthorized and illegal procedure. Both the forwarders and the motor carriers had established illegal joint rates and divisions. There was grave danger that the forwarders might be held liable to the truckers who had handled freight for them for the difference between the amounts of the charges as computed according to the motor carrier tariffs legally on file with the Commission and the amounts of the compensation actually paid in accordance with the invalid joint rate and division tariffs. Many suits of this nature were threatened and some were actually brought against the forwarders. Unless they could secure relief they faced the danger of financial ruin.

They appealed to Congress for relief. The result was the passage of Part IV of the Interstate Commerce Act, approved May 16, 1942, in which Congress provided for the regulation of forwarders and included in Section 419 a provision for relief from the past irregularities.

The legislative history as thus briefly outlined is borne out not only in the cases already cited, but in the various committee reports in the Senate and the House.

Part IV of the Interstate Commerce Act was Senate Bill 210 of the 77th Congress, 1st Session. There were no hearings on this bill. However, S.210 was merely a reintroduction, in substance, of Senate Bills 3665 and 3666, which had been introduced in the 76th Congress but not acted on. Hearings were held on S. 3665 and 3666 and are embraced in the transcript of the hearings on Senate Resolution 146.

The House counterpart of S. 210 was H. R. 3684, introduced by Mr. Lea at the 77th Congress, 1st Session.

Hearings were held on this bill. However, the House Committee on Interstate and Foreign Commerce substituted S. 210 with amendments for H. R. 3684 and filed its report on that basis. Because of the amendments proposed by the House Committee a conference committee was appointed and it made certain modifications of the House amendments, and S. 210 as thus amended became Part IV of the act.

The appellant has quoted a few paragraphs from House Report No. 1172, 77th Congress, 1st Session. But these passages are either altogether irrelevant or are couched in language of such generality as to afford no assistance to the solution of the present problem. Other portions of that report, however, are both relevant and specific and disclose the real purpose of Congress in enacting Section 419 to be as already outlined. For instance, the report states:

“Forwarders have been in operation for many years, but their greatest growth and development came with the advent of the motor truck as a transport agency. * * *

“Prior to the passage of the Motor Carrier Act, 1935, the forwarders employed the services of the motor carriers under special contractual arrangements, much as did the express companies in their inception. * * *

“When the Motor Carrier Act became effective as to tariffs of motor carriers, in 1936, the contractual arrangements were, as a result thereof, abrogated. The forwarders saw in this no threat to their operations, however, for they assumed, as did many others at that time, that Congress had intended to and did provide for the regulation of forwarding

carriers in the Motor Carrier Act. The language in the act which seemed to indicate such an intent was contained in Section 203(a), paragraph 14, as follows:

“‘The term “common carrier by motor vehicle” means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to Part I, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to Part I.’

“Freight forwarders accordingly filed their tariffs with the Interstate Commerce Commission and, pursuant to the provisions of the act, entered into arrangements with their connecting truck operators under which the truck operators filed concurrences in the tariffs of the freight forwarders as joint operators. In other words, the forwarders substituted a joint rate arrangement for the previously existing contractual arrangement, and generally, the same basis of compensation for the services rendered by the trucks as had been in existence prior to the enactment of the Motor Carrier Act was continued.

“Making a test case of the application of Acme Fast Freight, Inc., a forwarder, for a certificate under the act, the Commission, in 1937, in docket MC-2200, held that forwarding companies were not included within the definition above quoted and were, therefore, not regulated by the Motor Carrier Act, and later ordered Acme’s tariffs stricken from the

files. Other forwarding companies with tariffs on file with the Commission were later joined in an all-inclusive proceeding under docket *ex parte* No. MC-31, and their tariffs were likewise rejected.

“Recognizing the chaotic condition which would be created, however, if its orders in these cases became effective before Congress had an opportunity to consider and enact appropriate legislation relating to freight forwarders, the Commission postponed the effectiveness of such orders. During the time Congress has had such legislation under consideration, as outlined above, the Commission from time to time made further postponements. * * *.”

Dealing specifically with the section now numbered 419, the House report continues:

“As has been previously explained in this report, freight forwarders and common carriers by motor vehicle subject to Part II have been for a number of years operating under joint rates, which, by reason of the decision of the Commission in the *Acme case*, and in the other freight forwarder cases, they probably had no authority to establish and observe, even though the Commission’s orders in those cases have not yet become effective. As a result of this, various persons may have subjected themselves to penalties and liabilities under Federal statutes, even though during the period of operation under such joint rates there may have been no deliberate intention to violate the law, and no way of knowing for certain whether they were violating the law. Freight forwarders may be liable on account of failure to pay the regularly published tariff rates of common carriers by motor vehicle. Common carriers by motor vehicle may be subject to liability because of failure

to collect from freight forwarders their regularly published local rates. It is possible that shippers may also technically be subject to liabilities.

“This section relieves freight forwarders, common carriers by motor vehicle, and other persons from penalties and liabilities under the Interstate Commerce Act or any other Federal statute on account of anything done or omitted to be done, prior to the enactment of Part IV, in connection with the establishment, charging, collection, receipt, or payment of rates of freight forwarders, or joint rates or divisions between freight forwarders and common carriers by motor vehicle subject to Part II.”

The report of the Senate Committee on Interstate Commerce (S. Rept. 132, 77th Cong., 1st Sess.) comments on the occasion for the passage of an act regulating freight forwarders, upon the uncertainty as to the propriety of the joint rates with motor carriers that freight forwarders had sought to publish, and upon the Commission's decisions, sustained by the Supreme Court, holding that freight forwarders were not subject to the 1935 act. Nothing was said about liability for past acts. S. 210 as introduced contained no paragraph equivalent to present Section 419.

The report of the conference committee (H. Rept. No. 2066, 77th Cong., 2nd Sess.) on S. 210 contains the following comment on Section 419:

“Section 419 of the House Amendment, because of the unsettled legal status of joint rate arrangements between common carriers by motor vehicle and freight forwarders since the decision of the Commission in the *Acme* case (docket MC-2200) in 1937, provided that no person should be subject to

any punishment or liability under the provisions of any Federal statute, on account of any act done or omitted to be done prior to the effective date of Part IV, in connection with the establishment, charging, collection, receipt, or payment of rates of freight forwarders, of joint rates or divisions between freight forwarders and common carriers by motor vehicle subject to the Interstate Commerce Act. The Senate bill contained no such provision. Section 419 of the conference substitute is the same as the section passed by the House, except that it grants such immunity from punishment or liability under the provisions of the Interstate Commerce Act only. This change accords with the recommendation made by the Attorney General of the United States."

The foregoing statements from the committee reports plainly show a Congressional intent to limit the purpose and application of Section 419 to the precise situation clearly outlined in the reports. The narrowing of the scope of Section 419 by the conference committee, at the suggestion of the Attorney General, is significant in this connection. Also of some significance is the difference between the wording of the section in the House Bill as originally introduced and the wording as it now appears in the act. In H. R. 3684 the section (then numbered 418) reads as follows:

"No person shall be held to be subject to any criminal or civil liability under any provision of this Act on account of any act done or omitted to be done, prior to the effective date of this part, in connection with transportation which would have been transportation subject to this part if this part had been in effect at the time of such act or omission."

The foregoing language, although clearly intended to have the same meaning and purpose, is sufficiently general that it might be construed to afford broader immunity than can now possibly be claimed under the explicit provisions of Section 419.

The intention of Congress in enacting Section 419 was, it is overwhelmingly clear, to relieve forwarders and connecting carriers from a predicament in which they found themselves as a result of the decision in the *Acme* case invalidating the published tariffs naming the rates charged by forwarders to their patrons as well as the joint rates and divisions between forwarders and common carriers by motor vehicle subject to the act. This was as far as Section 419 was intended to go. There was not the slightest indication of a purpose to deprive the courts of jurisdiction of proceedings against forwarders arising out of other transactions, such as failure to pay the legally established rates of railroad companies. The purpose Congress had in mind was carried out in the wording of Section 419, and there is complete harmony between the plain, literal and natural meaning of the language there employed and the legislative history of the statute.

Conclusion.

While Section 419 is plain and unambiguous on its face and there is no need for resort to construction, reference to its legislative history demonstrates beyond the possibility of a doubt that it was not intended to deprive the courts of jurisdiction of suits to collect undercharges in the rates of railroads, whether filed against forwarders or other users of rail service, but that on the contrary it was enacted for the specifically limited purpose of affording relief from liability in connection with the establishment, collection, etc., of the rates charged by freight forwarders to their patrons and joint rates or divisions between freight forwarders and common carriers by motor vehicle subject to the Interstate Commerce Act.

Section 419 did not deprive the District Court of jurisdiction of the complaint in this case, and the Court properly entered judgment in favor of the appellee. The judgment should be affirmed.

Dated: October 28, 1944.

Respectfully submitted,

JONATHAN C. GIBSON,

WILLIAM F. BROOKS,

560 South Main Street, Los Angeles 13,

Attorneys for Appellee.

No. 10874

United States
Circuit Court of Appeals
For the Ninth Circuit.

JOSEPH P. BOYLE and EDWARD HAFT,
Appellants,
vs.
UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Montana

FILED

NOV - 6 1944

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

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MR. R. LEWIS BROWN,

Assistant Attorney of the United States in and
for the District of Montana,
Butte, Montana,
Attorneys for Appellee and Libelant.

[1*]

In the District Court of the United States in and
for the District of Montana

Butte Division

No. 110

UNITED STATES OF AMERICA,

Libelant,

v.

406 Bottles of Distilled Liquor,

Libelees.

Be It Remembered that on May 25, 1943, the
Libel of Information for Condemnation of the
Libelant United States of America was filed herein,
being in the words and figures following, to-wit:

[Title of District Court and Cause.] [2]

LIBEL OF INFORMATION FOR CONDEMNATION

The United States of America in its own right,
by R. Lewis Brown, Assistant Attorney of the
United States, in and for the District of Montana,
brings this libel of information for condemnation
against the libelees above named in a civil cause
for the forfeiture and condemnation of certain
distilled liquors as hereinafter set forth because
of a violation of the Internal Revenue Laws of
the United States, and upon information and belief
alleges as follows:

I.

That this Court has jurisdiction of the subject
matter hereof by reason of the provisions of Sec-
tion 3723(a), Title 26, United States Code.

II.

That on the 20th day of April, 1943, there was seized on land, at the Atlas Bar, at 137 East Park Street, in the city of Butte, county of Silver Bow, state and district of Montana, and within the jurisdiction of this court, by certain officers of the Internal Revenue of the United States, specially authorized by the Commissioner of Internal Revenue of the United States, 406 bottles of distilled liquor consisting of whiskey, brandy, rum and gin, and containing 60.9 proof gallons of alcohol, more or less, because of certain violations of the Internal Revenue Laws of the United States, as follows:

[3]

III.

That by virtue of the provisions of Subdivision (j), Section 2800, Title 26, U. S. C., there became due and payable on the 1st day of November, 1942, a floor stocks tax of \$2.00 on each proof gallon, and a proportionate tax at a like rate on all fractional parts of such proof gallon upon all distilled spirits upon which the Internal Revenue tax imposed by law had been paid and which on the said 1st day of November, 1942, were held and intended for sale.

IV.

That on the said 1st day of November, 1942, the premises at 137 East Park Street, in the city of Butte as aforesaid, were used and occupied as a saloon and a place where distilled spirits, upon which such Internal Revenue tax aforesaid was imposed, were held, intended for sale and sold for

beverage purposes, and that such business was being carried on under the name of the Atlas Bar.

V.

That on the said 20th day of April, 1943, certain Internal Revenue officers of the United States as aforesaid went into the said premises at 137 East Park Street, known as the Atlas Bar, and found therein and upon the said premises certain distilled spirits, in bottles, on which the above named tax was imposed and upon which the said tax had not been paid, and in addition found therein and in the said place or building certain other quantities of distilled spirits, in bottles, and that such of the said distilled spirits, in bottles, upon which the said tax had been imposed and which had not been paid, and which were in the said Atlas Bar on the said 20th day of April, 1943, were there kept, maintained and had for the purpose of being sold or removed by the owners thereof and the persons [4] operating the said business in fraud of the Internal Revenue Laws of the United States, or with design to avoid payment of the said taxes so levied and assessed upon such distilled spirits, and that by reason thereof and of the provisions of Section 3720, Title 26, U. S. C., such distilled liquors and all other distilled liquors in the said place or building became subject to seizure and forfeiture to the United States and the same and the whole thereof were immediately seized by the said officers of the Internal Revenue of the United States and taken into their possession and custody and that the same now

is in their said possession and custody at Butte, Montana,

Wherefore, in consideration of the premises, your libelant prays that all of said distilled spirits so seized, consisting of 406 bottles of distilled spirits as aforesaid may be proceeded against for forfeiture and condemnation in accordance with the Internal Revenue Laws of the United States and to this end this Honorable Court may issue process in due form according to the course of this court in cases of admiralty and maritime jurisdiction, and that all persons, firms, and corporations having or pretending to have any right, title or interest or claim in and to said distilled spirits above mentioned may be cited to appear herein and answer all and singular the premises aforesaid, and that if they cannot be found they may be cited to appear by process of publication in the manner provided by law.

That by an appropriate order this Honorable Court may adjudge and decree that the said 406 bottles of distilled spirits, particularly described and mentioned, be declared forfeited and condemned at the suit of this libelant according to the Internal Revenue Laws of the United States, and that the same be by this [5] Court directed to be turned over and delivered to the United States and its proper officers for its use, and that your libelant have a decree for costs against the owners or holders of the said distilled spirits condemned

and such further order or other relief or judgment as the nature of the case may require.

R. LEWIS BROWN

Assistant Attorney for the
United States, in and for
the District of Montana.

[6]

United States of America,
District of Montana—ss.

R. Lewis Brown, being first duly sworn, on oath, deposes and says:

That he is a duly appointed, qualified and acting Assistant Attorney of the United States, in and for the District of Montana, and as such makes this verification to the foregoing Libel of Information for Condemnation; that he has read the said Libel of Information for Condemnation and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

R. LEWIS BROWN

Subscribed and sworn to before me this 24th day of May, 1943.

[Seal]

HAROLD L. ALLEN

Deputy Clerk, United States
District Court, District of
Montana.

[Endorsed]: Filed May 25, 1943, C. R. Garlow, Clerk. [7]

That on June 3, 1943 the Notice of Seizure was filed herein in the words and figures following, to-wit:

[Title of District Court and Cause.] [8]

PROOF OF PUBLICATION

State of Montana,
County of Silver Bow—ss.

Clarence E. Blewett, being first duly sworn, deposes and says that he is the Principal Clerk of the Montana Labor News, a newspaper of general circulation published at the City of Butte, in Silver Bow County, State of Montana; that the notice of which a copy is hereto attached was first published in its issue of May 27, 1943, and was published in its issue of May 27, 1943, the last publication thereof being in the issue dated the twenty-seventh day of May, 1943.

CLARENCE E. BLEWETT

Principal Clerk.

(Here appears printed Notice of Seizure—omitted to avoid unnecessary duplication.) First publication May 27, 1943—1T.

Subscribed and sworn to before me this 28th day of May, 1943.

[Notarial Seal] FRANK L. RILEY,
Notary Public for the State of Montana, residing
at Butte, Montana.

My commission expires Jan. 8, 1946. [9]

[Title of District Court and Cause.]

NOTICE OF SEIZURE

Notice Is Hereby Given that a libel of information for condemnation has been filed by the above named libelant in the above entitled Court and cause:

That by order of Court there has been seized on land at Butte, in the county of Silver Bow, and within the state and district of Montana, the following, to-wit:

406 Bottles of Distilled Liquor;

That said libelant prays in said libel of information for condemnation that the above described distilled liquor be condemned and forfeited to the United States of America upon the following grounds:

That this Court has jurisdiction of the subject matter hereof by reason of the provisions of Section 3723(a), Title 26, United States Code.

That on the 20th day of April, 1943, there was seized on land, at the Atlas Bar, at 137 East Park Street, in the city of Butte, county of Silver Bow, state and district of Montana, and within the jurisdiction of this court, by certain officers of the Internal Revenue of the United States, specially authorized by the Commissioner of Internal Revenue of the United States, 406 bottles of distilled liquor consisting of whiskey, brandy, rum and gin, and containing 60.9 proof gallons of alcohol, more or less, because of certain violations of the Internal Revenue Laws of the United States, as follows:

That by virtue of the provisions of Subdivision (j), Section 2800, Title [10] 26, U. S. C., there became due and payable on the 1st day of November, 1942, a floor stocks tax of \$2.00 on each proof gallon, and a proportionate tax at a like rate on all fractional parts of such proof gallon upon all distilled spirits upon which the Internal Revenue tax imposed by law had been paid and which on the said 1st day of November, 1942, were held and intended for sale; that on the 1st day of November, 1942, the premises at 137 East Park Street, in the city of Butte, as aforesaid, were used and occupied as a saloon and a place where distilled spirits, upon which such Internal Revenue tax aforesaid was imposed, were held, intended for sale and sold for beverage purposes, and that such business was being carried on under the name of the Atlas Bar; that on the said 20th day of April, 1943, certain Internal Revenue officers of the United States as aforesaid, went into the said premises at 137 East Park Street, known as the Atlas Bar, and found therein and upon the said premises certain distilled spirits, in bottles, on which the above named tax was imposed and upon which the said tax had not been paid, and in addition found therein and in the said place or building certain other quantities of distilled spirits, in bottles, and that such of the said distilled spirits, in bottles, upon which the said tax had been imposed and which had not been paid, and which were in the said Atlas Bar on the said 20th day of April, 1943, were there kept, maintained and had for the pur-

pose of being sold or removed by the owners thereof and the persons operating the said business in fraud of the Internal Revenue Laws of the United States, or with design to avoid payment of the said taxes so levied and assessed upon such distilled spirits, and that by reason thereof and of the provisions of Section 3720, Title 26, U. S. C., such distilled liquors and all other distilled liquors in the said place or building became subject to seizure and forfeiture to the United States and the same and the whole thereof were immediately seized by the said officers of the Internal Revenue of the United States and taken into their possession and custody and that the same now is in their said possession and custody at Butte, Montana. [11]

That no libel of information for condemnation has been instituted under the Internal Revenue Laws of the United States of the said distilled spirits hereinbefore described, in any court of competent jurisdiction and that the proceedings herein are the only proceedings instituted and pending in said matter;

Notice Is Further Given that, by order of Court, all libelees herein named and all persons, firms and corporations having or claiming any interest in said distilled spirits, or having anything to say why the same should not be condemned and forfeited, appear and file their respective answers, claims and defenses to such libel of information for condemnation, setting forth their interest in or claims to said distilled spirits libeled, with the

Clerk of the above named court at Butte, Montana, on or before the 11th day of June, 1943.

Dated this 25th day of May, 1943.

E. LIEBERG

United States Marshal for
the District of Montana.

By PAUL J. ERLER

Deputy Marshal

[Endorsed]: Filed June 3, 1943, C. R. Garlow,
Clerk. [12]

That on June 2, 1943, the Claim and Intervention of Owners and Answer to Libel of Edward Haft and Joseph P. Boyle (also called J. P. Boyle and Joe Boyle), as co-partners doing business under the name of "Atlas Bar" was filed herein in the words and figures following, to-wit:

[Title of District Court and Cause.] [13]

CLAIM AND INTERVENTION OF OWNERS
AND ANSWER TO LIBEL

To The Honorable James H. Baldwin, Judge of
The District Court of the United States For
The District of Montana:

Come now Edward Haft and Joseph Boyle (also called J. P. Boyle and Joe Boyle), as co-partners doing business under the name of "Atlas Bar," and intervene herein as the owners and claimants of the above-named libelee, to-wit: 406 bottles of

distilled liquors; and file this, their answer to the the libel of information for condemnation heretofore filed herein, and allege:

I.

That they are, each and both, residents of Butte, in the State and District of Montana, and are engaged in business as the "Atlas Bar" at 137 East Park Street, Butte, Montana, and at such place of business are retail liquor dealers, duly licensed by the United States to engage in such business and to sell intoxicating liquor at retail.

II.

Admit the allegations of paragraphs I, III and IV of said libel.

III.

Answering paragraph II of the said libel, these claimants admit that on the 20th day of April, 1943, there was seized on land, at the Atlas Bar, 137 East Park Street, in the City of Butte, County of Silver Bow, State and District of Montana, and within the jurisdiction of this Court, by said officers of the United States, 406 bottles of distilled liquors, consisting of whiskey, brandy, rum and gin, and containing 60.9 proof gallons of alcohol, more or less; and deny each and every other allegation [14] of said paragraph II.

IV.

Denies each and every allegation contained in paragraph V of said libel.

V.

Further answering said paragraphs II, III and V of said libel, these answering claimants deny that any of the liquors seized by the agents of the United States Government, the libelant herein, on April 20, 1943, at 137 East Park Street, Butte, Montana, was subject to any unpaid internal revenue taxes of any kind, character or description, and allege the fact to be that all taxes had been paid on each and every one of the 406 bottles of distilled liquors named as libelee herein.

By way of first affirmative defense, and in propounding its claim of ownership, these claimants and intervenors allege:

I.

That they are, each and both, residents of Butte, in the State and District of Montana, and are engaged in business as the "Atlas Bar" at 137 East Park Street, Butte, Montana, and at such place of business are retail liquor dealers, duly licensed by the United States to engage in such business and to sell intoxicating liquor at retail.

II.

That at all times herein mentioned one D. E. Deneen was the agent in charge of the alcoholic tax unit for the District of Montana, acting under the direction and jurisdiction of Lewis Penwell, Collector of Internal Revenue for the District of Montana; and that the acts hereinafter described

were done and performed by D. E. Deneen and his deputies and assistants, as an agent in charge of the alcoholic tax unit for the District of Montana, purporting to act under Sec. 3720, Title 26, U. S. C.

[15]

III.

That heretofore at Butte, in the State and District of Montana, said D. E. Deneen did enter upon the premises of these petitioners, at 137 East Park Street, Butte, Montana; and without search warrant, or warrant of any kind, and without authority of law, did take from the possession of these interveners, 406 bottles of distilled liquors, containing 60.9 proof gallons of alcohol, more or less, as follows:

| Proof | Trade Name | $\frac{1}{2}$ Pints | Pints | Fifths | Quarts | Proof Gallons |
|-------|--------------------------------|---------------------|-------|--------|--------|---------------|
| 86.8 | Kinsey | ... | ... | 72 | ... | 12.10 |
| 84 | Roma Brandy | ... | 60 | ... | ... | 10.60 |
| 84 | Swiss Colony Brandy | ... | 6 | ... | ... | .63 |
| 86 | J. B. Cella Brandy | 2 | ... | ... | ... | .11 |
| 80 | Mint Springs | ... | 2 | ... | ... | .30 |
| 90 | Boston Dry Gin | 8 | ... | ... | ... | .45 |
| 100 | Old Grand Dad | ... | 6 | ... | ... | .75 |
| 70 | Boston Sloe Gin | ... | ... | ... | 1 | .14 |
| 100 | Old Taylor Whiskey | ... | 6 | ... | ... | .75 |
| 86.8 | Kinsey Whiskey | ... | ... | 5 | ... | .87 |
| 100 | Old Grand Dad | ... | ... | ... | 1 | .25 |
| 86.8 | Kinsey Whiskey | ... | ... | 5 | ... | .87 |
| 70 | Blackberry Brandy | ... | 2 | ... | ... | .18 |
| 84 | Roma Brandy | ... | ... | 1 | ... | .17 |
| 86.8 | Kinsey Whiskey | ... | ... | 1 | ... | .17 |
| 86.8 | Kinsey Whiskey | ... | ... | 1 | ... | .17 |
| 84 | Roma Brandy | ... | ... | 2 | ... | .34 |
| 86 | Sevilla Rum | ... | ... | 2 | ... | .34 |
| 86.8 | Kinsey Whiskey | ... | ... | 4 | ... | .69 |
| 80 | Mint Springs | ... | 2 | ... | ... | .20 |
| 80 | Mint Springs | ... | 6 | ... | ... | .60 |
| 70 | Boston Blackberry Brandy | ... | 3 | ... | ... | .26 |

| Proof | Trade Name | $\frac{1}{2}$ Pints | Pints | Pfths | Quarts | Proof Gallons |
|------------|----------------------------|---------------------|-------|-------|--------|---------------|
| 86.8 | Kinsey Whiskey | --- | --- | 1 | --- | .17 |
| 80 | Cavalier Gin | --- | 13 | --- | --- | 1.30 |
| 90 | Seagrams 5 Crown | --- | 3 | --- | --- | .34 |
| 86.8 | Seagrams | 1 | --- | --- | --- | .05 |
| 84 | Roma Brandy | --- | --- | 5 | --- | .84 |
| 84 | Swiss Colony Brandy | --- | 2 | --- | --- | .21 |
| 90 | Boston Gin | 36 | --- | --- | --- | 2.03 |
| 100 | Old Taylor Whiskey | --- | 5 | --- | --- | .63 |
| 100 | Old Grand Dad | --- | 3 | --- | --- | .38 |
| 86 | Sevilla Rum | --- | --- | 4 | --- | .69 |
| 100 | Old Grand Dad | --- | 6 | --- | --- | .75 |
| 86.8 | Kinsey Whiskey | --- | --- | 120 | --- | 20.8 |
| 84 | Roma Brandy | --- | --- | 1 | --- | .1 |
| 100 | Old Grand Dad | --- | --- | --- | 1 | .25 |
| 86 | Sevilla Rum | --- | --- | 1 | --- | .1 |
| 86.8 | Philadelphia Whiskey | --- | --- | 1 | --- | .1 |
| 80 | Cavalier Gin | --- | --- | --- | 1 | .2 |
| Total..... | | | | | | 60.9 |

IV.

That these claimants were, on the 20th day of April, 1943, the owners and in possession of all of the distilled liquors last [16] above described, and on April 20, 1943, and at all times herein mentioned, were and have been duly authorized by the United States Government to sell such liquors at retail.

V.

That all Federal taxes on each and every one of said bottles of intoxicating liquors, or distilled spirits, had been paid in full long prior to April 20, 1943, the date of seizure; and that none of said liquor, at the time of seizure, on April 20, 1943, or at 137 East Park Street, was contraband in the sense that no Federal tax had been paid thereon.

VI.

That these intervenors had paid the floor tax imposed by the Internal Revenue Act of 1942 on such of said liquors as was in the possession of these intervenors on November 1, 1942; and that all of such liquors as were purchased subsequent to said date were purchased by these intervenors from the Montana Liquor Store, owned and operated by the State of Montana, and at the times of said respective purchase said liquors, and all thereof, had had the Federal tax paid thereon.

VII.

That all of said bottles bear internal revenue stamps, showing the tax thereon to have been paid,

with the exception of wines, if any, which show the tax receipts and tax stamps upon the original packages.

VIII.

That no just or legal cause existed on April 20, 1943, for the seizure or withholding from these intervenors of said property; and that these intervenors now are, and at the time of said seizure and at all times since the respective dates of the purchase of said liquors have been, the legal owners of each and all of said bottles of liquor; and these intervenors were in physical possession of said bottles of liquor at their said place of [17] business from the respective dates of the purchase of said liquors, up until the time of the seizure thereof by said D. E. Deneen, as aforesaid.

IX.

That at the time and place of said seizure, said D. E. Deneen and his deputies also took from the possession of these intervenors, and now withhold, all invoices, receipts for taxes paid, and all bills and other receipts, and other evidences of purchases and tax transactions then in possession of these intervenors; and said D. E. Deneen and his deputies still withhold and retain said papers relating to the business of these intervenors, from these intervenors.

X.

That these intervenors are entitled to the immediate return of said property above described.

Whereof These Intervenors and Answering Claimants Pray: That said libel of information for condemnation be dismissed; that this Honorable Court decree a restitution of the aforesaid property to them; and that this Honorable Court make such other and further order and decree as right and justice may determine in the premises.

EARLE N. GENZBERGER

Proctor and Attorney for Intervenors and Answering Claimants, Edward Haft and Joseph P. Boyle (also called J. P. Boyle and Joe Boyle).

United States of America, *District of America*, L
State of Montana, County of Silver Bow—ss.

Edward Haft and Joseph P. Boyle (also called J. P. Boyle and Joe Boyle), being first duly sworn, each for himself, depose and say: That they are the intervenors and answering claimants named in the foregoing claim and intervention of owners and answer the libel; that they have read the foregoing answer, know the contents thereof, and that the matters and things therein [18] stated are true to their own knowledge.

EDWARD HAFT

JOE P. BOYLE

Subscribed and sworn to before me this 1st day of June, 1943.

[Notarial Seal] EARLE N. GENZBERGER

Notary Public for the State of Montana, residing
at Butte, Montana.

My commission expires 9/14/43.

Service of the foregoing claim and intervention of owners and answer to libel acknowledged and copy thereof received this 3rd day of June, 1943.

.....

United States Attorney.

R. LEWIS BROWN

Asst. United States Attorney.

[Endorsed]: Filed June 2, 1943, C. R. Garlow, Clerk. [19]

—————

That on June 3, 1943 the Warrant of Arrest and Monition was filed herein in the words and figures following, to-wit:

[Title of District Court and Cause.] [20]

WARRANT OF ARREST AND MONITION

The President of the United States of America.

To the Marshal of the United States for the District of Montana, Greeting;

1. Whereas a libel of information for condemnation has been filed in the above entitled court and action on the 25th day of May, 1943, by the United States of America, as libelant, against the above captioned libelees, which said distilled liquors are now in the possession of the officers of the Internal Revenue of the United States, at the Federal Building, Butte, Montana, and claimed as forfeited to the United States for a violation of the Internal Revenue Laws of the United States, which said

libel of information for condemnation prays the usual process and monition of said Court in that behalf to be made, and that all persons, firms or corporations claiming any interest in said distilled liquors may be cited to answer or claim in the premises, and all proceedings be had, that said distilled liquors may, for the causes in said libel of information for condemnation set forth, be condemned and forfeited to the United States of America.

2. You Are, Therefore, Directed and Commanded Hereby to arrest and take the property described in the caption hereof, into your possession for safe custody and to attach the same and to detain said distilled liquors in your custody until the further [21] order of this Court regarding the same, and to give notice of such seizure, to all libelees above named and to all persons, firms and corporations claiming the same, or knowing or having anything to say why the same should not be condemned at the suit of said libelant, pursuant to the prayer in said libel of information for condemnation contained, and that they be cited to file with the Clerk of this Court, at the city of Butte, state and district of Monana, their answers or claims to said libel of information for condemnation, setting forth their interest or claims to the distilled liquors so libeled, if any they have, on or before the 11th day of June, 1943, which date is made, by order of Court, the return day hereon and the time within which answers or claims must be filed.

Said notice shall contain the substance of said

libel of information for condemnation and shall state the return day so ordered and you shall cause the same to be published by one publication in a newspaper of general circulation, published at or near the place of seizure, to-wit: The Montana Labor News, a newspaper of general circulation, published at Butte, Montana, and by posting a copy of said notice in the most public manner at or near the place of trial, to-wit: Butte, Montana, said publication and proclamation to be printed and posted at least fourteen days prior to said return day; and what you shall have done in the premises do you then make return thereon, together with this writ.

Witness the Honorable James H. Baldwin, Judge of the above named court, in the city of Butte, within the said state and district of Montana, this 25th day of May, 1943.

[Seal]

C. R. GARLOW

Clerk, United States District
Court for District of Mon-
tana.

By HAROLD L. ALLEN

Deputy Clerk

[Endorsed]: Filed June 3, 1943. [22]

That on June 3, 1943 the Marshal's Return on Warrant of Arrest and Monition was filed herein in the words and figures following, to-wit:

[Title of District Court and Cause.] [23]

MARSHAL'S RETURN

United States of America,
District of Montana—ss.

I hereby certify and return that I received the within Warrant of Arrest and Monition on the 25th day of May, 1943 and executed the same, as follows:

That I attach the following described property, to wit: 406 bottles of distilled liquor consisting of whiskey, brandy, rum and gin on the 25th day of May, 1943, at Butte, Montana and on said date appointed I Paul J. Erler took possession thereof and are now in my custody.

That I served copies of the Warrant of Arrest and Monition, Libel of Information, and Notice of Seizure herein on, libelee , above named, on the day of, at, Montana.

That I caused said Notice of Seizure, setting forth the substance of the Libel of Information herein to be published in one weekly issues of the Montana Labor News, a newspaper of general circulation published at Butte, Silver Bow County, Montana, at least fourteen days prior to the return day fixed by order of Court herein, publisher's affidavit being hereto attached and made a part of this return.

That I posted a copy of said Notice of Seizure in the most public manner at Lobby of Post Office in

the city of Butte, Montana, on the 25th day of May, 1943.

The original Notice of Seizure and the receipt of the custodian above named is attached hereto and made a part of this return.

Dated this 26th day of May, 1943.

E. LIEBERG,

U. S. Marshal for the District
of Montana.

By PAUL J. ERLER

Deputy.

United States Marshal's Fees: Expenses Publication \$10.08.

[Endorsed]: Filed June 3, 1943, C. R. Garlow,
Clerk. [24]

That on June 7, 1943 the Reply of the Libelant United States of America was filed herein in the words and figures following, to-wit:

[Title of District Court and Cause.] [25]

REPLY

Comes now the libelant above named, the United States of America, and for its reply to the first affirmative defense of the intervenors Edward Haft and Joseph P. Boyle contained in their claim and intervention to the libel of information and deny and allege as follows:

I.

Admit the allegations set out and contained in

Paragraphs I, II, and IX on the said first affirmative defense.

II.

Admit that heretofore officers and agents of the Alcohol Tax Unit, acting under the direction of D. E. Denneen, did enter upon the premises at 137 East Park Street, Butte, Montana, and without a search warrant or a warrant of any kind did take from the possession of the intervenors the bottles of distilled liquor described in Paragraph III of the said first affirmative defense, and deny all of the other matters, things and allegations contained in said paragraph.

III.

Admit that on the 20th day of April, 1943, the said liquor, as described in Paragraph III of the said first affirmative defense, was in the possession of the intervenors and allege that the libelant does not know whether or not the intervenors were on said day the owners of said liquor, and allege that on April 20, 1943, and at all times since said time, [26] the said intervenors have been in the possession of a retail liquor dealers' stamp issued to them by the libelant and deny that the said intervenors on said day or at any time subsequent to the first day of November, 1942, were duly authorized by the United States government, or authorized by the United States government at all, to sell the liquor described in Paragraph III of the said first affirmative defense at retail, and as alleged in Paragraph IV of the said first affirmative defense.

IV.

Deny the matters, things and allegations contained in Paragraphs V, VI, VII, and X of the first affirmative defense of the intervenors.

V.

Admit that the intervenors were in physical possession of the bottles of liquor at their place of business from the respective dates of the purchase of said liquor to the date of the seizure of the same; allege that it is without knowledge as to whether or not the intervenors are the legal owners of the said bottles of liquor and deny all of the other matters, things and allegations set out and contained in Paragraph VIII of the said first affirmative defense.

Wherefore, the libelant, having fully replied, renews the prayer for the relief set out and contained in its libel of information for condemnation on file herein.

R. LEWIS BROWN

Assistant Attorney of the
United States, in and for
the District of Montana.

[27]

United States of America,
District of Montana—ss.

R. Lewis Brown, being first duly sworn, on oath, deposes and says:

That he is a duly appointed, qualified and acting Assistant Attorney of the United States, in and for

the District of Montana, and as such makes this verification to the foregoing Reply; that he has read the same and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

R. LEWIS BROWN

Subscribed and sworn to before me this 7th day of June, 1943.

[Seal]

HAROLD L. ALLEN

Deputy Clerk, United States
District Court for the Dis-
trict of Montana.

Acknowledgment of Service, June 7th, 1943.

EARLE N. GENSBERGER

Attorney for Intervenors

[Endorsed]: Filed June 7, 1943. C. R. Garlow,
Clerk. [28]

That on August 27, 1943 an Entry was made in the Minutes of said District Court concerning request herein for setting of matter for trial in the words and figures following, to-wit: [29]

[Title of the District Court.]

40th day May Term 1943 Friday, August 27, 1943.

10:00 A. M. Court convened pursuant to
Adjournment

Present: Honorable James H. Baldwin, Judge.

* * *

No. 110

United States vs. 406 Bottles of Distilled Liquor

At this time Mr. Earle N. Genzberger, attorney for Edward Haft and Joseph P. Boyle, requested the Court to set this matter for trial sometime during the month of September, whereupon Court stated that the matter would not be heard in September, but that it may be set for sometime in October.

* * *

Court thereupon adjourned until 10 A. M. tomorrow.

C. R. GARLOW,
Clerk. [30]

That on December 13, 1943, the Order Setting Case For Trial was filed and entered herein in the words and figures following, to-wit:

[Title of District Court and Cause.] [31]

ORDER SETTING CASE FOR TRIAL

It is ordered, and this does order:

1. That this case be and the same is hereby set for trial before the Court, at the court room thereof, in the city of Butte, in the state and district of Montana, at Ten o'clock in the morning on Tuesday, December 21, 1943; and,

2. That the Clerk of the above-entitled Court forthwith notify the parties litigant, by mail, of the making of this order.

Done in open court at Butte, Montana, December 13, 1943.

JAMES H. BALDWIN

United States District Judge,
District of Montana

[Endorsed]: Filed and Entered Dec. 13, 1943.
C. R. Garlow, Clerk. [32]

That on December 21, 1943 the Motion To Compel Production was filed herein in the words and figures following, to-wit:

[Title of District Court and Cause.] [33]

MOTION TO COMPEL PRODUCTION

To the Honorable James H. Baldwin, Judge of the above-entitled Court.

Come now the intervenors and claimants, Joseph P. Boyle and Ed Haft, and move the above-entitled court for an order compelling the libelant to produce in Court the thirteen pints of Cavalier Gin and one quart of Cavalier Gin described in Exhibit "3" introduced in evidence in this case, and also to produce in Court and at the hearing of this action the liquor store sales slips, invoices receipts for taxes paid, and all bills and other receipts, and other evidences of purchases and tax transactions, seized by the officers of the libelant from these claimants and intervenors on April 20th, 1943 at 137 East Park St., Butte, Montana, as alleged in Paragraph IX of the first affirmative defense of the intervenors herein and admitted in Paragraph I of the Reply herein.

EARLE N. GENZBERGER

Attorney for Intervenors and
Claimants

Service of the foregoing Motion acknowledged and copy thereof received this 21st day of December, 1943.

R. LEWIS BROWN

Assistant U. S. Attorney,
Attorney for Libellant.

[Endorsed]: Filed Dec. 21, 1943. C. R. Garlow,
Clerk. [34]

That on December 21, 1943 an Entry was made in the Minutes of said District Court concerning the proceedings had on the trial herein in the words and figures following, to-wit:

[Title of the District Court.]

14th Day October Term 1943

Tuesday, December 21, 1943.

10:00 A. M. Court Convened pursuant to order

Present: Honorable James H. Baldwin. Judge.

No. 110

United States vs. 406 Bottles of Distilled Liquor

This cause was duly called for trial at 10 A. M. this day, Mr. R. Lewis Brown, Assistant United States District Attorney, was present and appeared for the United States, and there was no appearance by the claimants and owners, nor by counsel in their behalf.

Thereupon Mr. Brown stated that he desired to call to the attention of the Court the fact that an

offer in compromise has been made herein, and that it is now under consideration by the Attorney General.

Thereupon Court ordered that a recess be taken until 10:30 A. M. when the trial of the cause will be proceeded with.

Thereafter, at 10:30 A. M., counsel for the respective parties were present in Court, Mr. R. Lewis Brown, Assistant United States District Attorney, appearing for the United States and Mr. Earle N. Genzberger, Attorney, appearing for the claimants and owners, Edward Haft and Joseph P. Boyle.

Thereupon Mr. Genzberger stated to the Court that an offer in compromise has been made in this case and that he did not think that the case would be tried until the offer had been disposed of, and now moved the Court to continue the trial of this case until next Monday morning at ten o'clock. Thereupon Court stated that the motion for continuance should have been made in writing and noticed for hearing, and that the trial of this case will not now be continued.

Thereupon Neil D. McCarthy was sworn and examined as a witness for the United States, and a certain Return of Floor Stocks Tax on Distilled Spirits, etc., signed by Edward Haft, Partner and sworn to on November 25, 1942, marked as Plff's Exhibit No. 1 was offered and received in evidence without objection.

Thereupon John H. Cosgriff was sworn and examined as a witness for the United States and Plff's Exhibit No. 2, being a duplicate of Plff's Ex-

hibit No. 1, was offered and received in evidence without objection.

Thereupon Mr. Genzberger asked that the seized liquor herein be produced in Court and admitted in evidence for examination by the Court, to which request the government objected. Thereupon Court ordered that the request be denied, and the exception of the claimants and owners to the ruling of the Court was duly noted.

Thereupon Court ordered the record to show that no request by subpoena or by order of Court for the production of the liquors was made, and that if the parties desired proof of this kind they should have served on the person having the liquor in charge a subpoena duces tecum.

Thereupon a certain inventory of the liquors seized by Agent John H. Cosgriff on April 20, 1943, marked as Defts. Exhibit No. 3 was offered and received in evidence without objection.

Thereupon Edward H. Donovan and Stephen Sullivan were sworn and examined as witnesses for the United States. Thereupon Mr. Brown offered in evidence the Claim and Intervention of Owners and Answer to Libel, filed herein, to which offer the claimants and owners objected, whereupon the offer was withdrawn by Mr. Brown. Thereupon W. S. Manley was sworn and examined as a witness [36] for the United States, whereupon the United States rested.

Thereupon the claimants and owners herein filed and presented to the Court a motion to dismiss the

libel of information and to refuse condemnation upon the grounds set forth in said motion, whereupon said motion was argued by counsel, submitted and by the Court denied. The exception of the claimants and owners to the ruling of the Court was duly noted.

Thereupon the claimants and owners filed and presented to the Court a motion to compel production in Court the 13 pints and 1 quart of Cavalier Gin, described in Exhibit 3, and certain liquor store sales slips, invoices, etc., mentioned in the motion, to which the government objected as not timely made. Thereupon Court ordered that the motion be and is denied, to which ruling of the Court the claimants and owners excepted and exception duly noted.

Thereupon Joseph P. Boyle, John J. Walsh and T. D. McGarry were sworn and examined as witnesses for the claimants and owners. A certain work sheet of the witness McGarry, from which exhibits 1 and 2 were made, and a certain inventory of liquors handed to McGarry by the witness John J. Walsh, were marked as Defts. Exhibits 4 and 5, respectively, but were not offered in evidence.

Thereupon Mr. Genzberger stated that his next witness is Edward Haft; that said witness is not now present, and that the claimants and owners have no other witnesses. Thereupon Court ordered that the Marshal call the said witness Edward Haft three times at the door, which was done, and said

witness failed to appear or respond. Thereupon Mr. Genzberger stated that the witness Haft is now on his way here from Missoula, and moved the Court to take a recess until 4:30 this afternoon or to continue the trial of the cause until ten o'clock tomorrow morning, which motion was by the Court denied. Thereupon the government announced that it rested.

Thereupon Court ordered the record to show that it appearing from an inspection of the record that on the 13th day of December 1943, this proceeding was set for trial before the Court here at ten o'clock in the morning on this day; that it appears from the statement of the attorney for the claimants that he had knowledge of the setting six days ago; that he made no effort to secure the attendance of the witness Haft by subpoena; that when the case was called for trial this morning the claimants each failed to appear, as did their attorney; that for their convenience the Court continued the trial until ten thirty o'clock in the morning on this day; that at the conclusion of the Government's case at 11:55 this morning, counsel for the claimants stated definitely in court that unless the Court would continue the case until ten o'clock tomorrow he would have to stall the case through the afternoon to secure the attendance of the witness Haft; that the Court then stated to counsel there would be no stalling of the trial of the case in this court, that this case would be tried as other cases and that the neglect of the parties to appear to protect their own interests would not justify the

Court in continuing the trial of the case for the convenience of the litigant who neglected his own interest when it was not made to appear to the Court by the record or in any other way that the testimony of the witness Haft, if here, would have any material bearing on any issue in this proceeding. We will let the record stand as it is made.

Thereupon Mr. Genzberger asked that an exception be noted, and the Court stated that you are entitled to an exception.

Thereupon Mr. Genzberger asked that the letter of Assistant United States Attorney Allan, dated Dec. 16, 1943, be placed in the record, to which the Government objected.

Thereupon Court ordered the record to show that at this time the claimant Joseph P. Boyle, also known as J. P. Boyle and Joe Boyle, and the claimant Edward Haft having announced through their attorney, Mr. Earle N. Genzberger, that they have not at this time any further evidence to produce, and the government having stated that it had no rebuttal to offer, the matter is considered by the Court as submitted for decision and judgment, and upon that submission the Court finds the facts to be as follows: at all of the times hereinafter mentioned the claimants Edward Haft and Joseph P. Boyle, also called J. P. Boyle and Joe Boyle, were co-partners doing business under the firm name and style of the Atlas Bar in those certain premises located at 137 East Park Street in the city of Butte, in the county of Silver Bow, in the [37] state and

district of Montana, as retail dealers in alcoholic liquors. On April 20, 1943, there was seized on land at the Atlas Bar, 137 East Park Street, in the city of Butte, county of Silver Bow, state and district of Montana, and within the jurisdiction of this court, by certain officers of the Internal Revenue service of the United States of America, specially authorized by the Commissioner of the Internal Revenue of the United States of America, 406 bottles of distilled liquor consisting of whiskey, brandy, rum and gin, and containing sixty and nine-tenths proof gallons of alcohol, more or less, because of certain violations of the Internal Revenue laws as follows: that by virtue of the provisions of sub-division (j) of Section 2800 of Title 26 of the United States Codes there became due and payable on the first day of November, 1942, a floor stocks tax of \$2 on each proof gallon and a proportionate tax at a like rate on all fractional parts of each proof gallon upon all distilled spirits upon which the internal revenue tax imposed by law had been paid, and which on the first day of November, 1942, was held and intended for sale; that the liquor hereinbefore referred to is specifically described in paragraph 3 of the first affirmative defense set out in the claim and intervention of Joseph P. Boyle, also called J. P. Boyle and Joe Boyle, and Edward Haft, filed herein on June 2, 1943; that all of the liquor so seized and specifically described was on November 1, 1942, held by the claimants Edward Haft and Joseph P. Boyle, also called J. P. Boyle and Joe Boyle, as co-partners doing business under the name of Atlas Bar and by

them and each of them intended for sale at that time, and at all of the times thereafter the premises at 137 East Park Street in the city of Butte, as aforesaid, were used and occupied by the claimants Edward Haft and Joseph P. Boyle, also called J. P. Boyle and Joe Boyle, as a saloon and a place where distilled spirits upon which the internal revenue tax of the United States was imposed were held, intended for sale and sold for beverage purposes, and that such business was carried on under the name and style of the Atlas Bar at all of said times. On April 20, 1943, certain internal revenue officers of the United States of America went into the said premises at 137 East Park Street, in the city of Butte, in the state and district of Montana, known as the Atlas Bar, and found therein and upon the said premises certain distilled spirits in bottles on which the above-named floor tax was imposed and upon which the said floor tax had not been paid, and in addition found therein and in the said place of business certain other quantities of distilled spirits in bottles and that such of said distilled spirits in bottles on which said floor tax had been imposed had not been paid and which were then in said Atlas Bar at said address on the said 20th day of April, 1943, were there kept, maintained and had by the claimants Edward Haft and Joseph P. Boyle, also known as J. P. Boyle and Joe Boyle, for the purpose of being sold and removed by said last named persons who were then and there the owners thereof, and the persons operating the said business, in

fraud of the Internal Revenue laws of the United States of America, and with design to avoid payment of the floor tax levied and assessed upon such distilled spirits, and that by reason thereof and the provisions of Section 3720 of Title 26 of the United States Codes, such distilled liquor and all other distilled liquors in the place of business specifically described in said paragraph 3 of the first affirmative defense of the claimants Joseph P. Boyle, also called J. P. Boyle and Joe Boyle and Edward Haft, filed herein on June 2, 1943, became subject to seizure and forfeiture to the United States of America, and the same and the whole thereof were immediately seized by the said officers of the Internal Revenue of the United States and taken into their possession and custody and that the same now are in their possession and custody at Butte, Montana.

The Court finds generally each and all of the issues presented by the pleadings on file herein in favor of the libelant and against the libelee and the claimants Joseph P. Boyle, also called J. P. Boyle and Joe Boyle, and Edward Haft, and from the facts so found the Court concludes as a matter of law that this Court has jurisdiction of this proceeding, the subject matter, the libelant, the libelee, and said Edward Haft and Joseph P. Boyle, [38] also called J. P. Boyle and Joe Boyle, and that the libelant is entitled to all of the relief prayed for in its libel of information for condemnation filed herein on May 25, 1943. Proper forms of written findings of fact and conclusions of law and judgment

will be presented to the Court for signature and filing.

Court thereupon suspended until such time as the further business of the Court shall require it to again resume.

C. R. GARLOW,

Clerk.

By H. H. WALKER,

Deputy. [39]

That on December 21, 1943 an exhibit marked Plaintiff's Exhibit No. 1 was admitted in evidence on behalf of the Libelant United States of America upon the trial herein in the words and figures following, to-wit: [40]

PLAINTIFF'S EXHIBIT No. 1

[In pencil] : 228.51

[Stamp] : X 2 Dec 1942

To be prepared in Triplicate

Original

First Read Carefully Instructions Furnished by the Collector of Internal Revenue

Date Received by
Collector

Form 758

Treasury Department

U. S. Internal Revenue

(Revised 1942)

To Be Filled in by the Collector

List

Dec 2 1942

Page

Line

5107

Received

Amount due

\$228.51

With Remittance

Amount paid

\$228.51

Nov 30 1942

Helena, Montana

Amount assessed

\$

Collector Internal Revenue

Checked by

Return of Floor Stocks Tax on Distilled Spirits, Malt Liquors, and Wines
Under the Revenue Act of 1942

Name of Taxpayer: Charles Moutrey, Joe Boyle, Edward Haft (The Atlas)
(Give last name first)

Place of Business: 137 East Park Street
(Street)

Butte, Montana
(City or town) (State)

Helena, Montana
(City) (State)

Class of Business: Retail Liquor Dealer
(To be filled in by Taxpayer)

(To be filled in by the Collector when blanks
are distributed)

To Collector of Internal Revenue at—

Plaintiff's Exhibit No. 1—(Continued)

The following, together with the accompanying inventory is a full and true return of all distilled spirits, malt liquors, and wines of any description which were on November 1, 1942 (the date specified in the Revenue Act of 1942 for the imposition of the floor stocks tax), owned by the above-named taxpayer and held at the place named above, or stored elsewhere, or in transit to or from such taxpayer, and intended for sale or for use in the manufacture or production of any article intended for sale, and of the floor stocks tax due thereon:

*Date to be inserted by person executing this return. Such date will be found in the Collector's instructions which were mailed with this form.

| Commodity (A) | Quantity (B) | Rate of Tax (C) | Amount of Tax (D) |
|--|-----------------|--------------------|----------------------|
| 1. Distilled spirits (proof gallons)..... | 112.28872 | 2.00 | \$224.58 |
| 2. Malt liquors (barrels) | 3.335 | 1.00 | 3.33 |
| 3. Wines containing 14% alcohol or less (gallons)..... | 2.20 | .10 | .22 |
| 4. Wines containing 14% to 21% alcohol (gallons)..... | 3.75 | ..... | .38 |
| 5. Wines containing 21% to 24% alcohol (gallons)..... | ..... | ..... | ..... |
| 6. Champagne and sparkling wines (½ pints or fractions thereof) | ..... | ..... | ..... |
| 7. Artificially carbonated wines (½ pints or fractions thereof)..... | ..... | ..... | ..... |
| 8. Total tax due (total of lines 1 to 7)..... | ..... | ..... | <u>\$228.51</u> |

Plaintiff's Exhibit No. 1—(Continued)

I solemnly swear (or affirm) that the foregoing, together with the accompanying inventory), is a true and correct return of all the distilled spirits, malt liquors, and wines subject to the floor stocks tax as provided by the Revenue Act of 1942, and that the amount of tax returned covers all the liability incurred by the person, firm, or corporation, named above, on distilled spirits, malt liquors, and wines on the day specified, to the best of my knowledge and belief.

Sworn and subscribed to before me this 25th
day of November, 1942.

(Signed)

EDWARD HAFT

[Seal]

JOHN J. WALSH

Partner

(State whether individual owner, member of firm, or, if
officer of corporation, give title)

Notary Public for the State of Montana, Resid-
ing at Butte, Montana.

My Commission Expires February 26th, 1943

Joe Boyle, Charles Moutrey, and Edward Haft
Atlas Bar

137 East Park Street

Butte, Montana

Retail Liquor Dealer Stamp No. 167749

Plaintiff's Exhibit No. 1—(Continued)

| | | | | | |
|-------------------------|-------|----|---------|------|--------|
| Century Club | Qt. | 14 | 3.5000 | 90% | 3.1500 |
| “ | Pt. | 25 | 3.1250 | 90 | 2.8125 |
| Cream of Kentucky | Pt. | 13 | 1.6250 | 86 | 1.3975 |
| “ | ½ Pt. | 61 | 3.8125 | 86 | 3.2787 |
| Kessler | Fifth | 6 | 1.2000 | 85 | 1.0200 |
| “ | Pts. | 15 | 1.87500 | 85 | 1.5938 |
| “ | ½ Pt. | 64 | 4.0000 | 85 | 3.4000 |
| Old Sunnybrook | Qt. | 12 | 3.0000 | 90.4 | 2.7120 |
| “ | Pt. | 52 | 6.5000 | 90.4 | 5.8760 |
| “ | ½ Pt. | 58 | 3.625 | 90.4 | 3.2770 |
| Old Taylor | Qt. | 2 | .5000 | 100 | .5000 |
| “ | Pt. | 31 | 3.8750 | 100 | 3.8750 |
| Old Grandad | Qt. | 18 | 4.5000 | 100 | 4.5000 |
| “ | Pt. | 62 | 7.7500 | 100 | 7.7500 |
| Old Oscar Pepper | Fifth | 12 | 2.4000 | 86 | 2.0640 |
| “ | Pt. | 37 | 4.6250 | 86 | 3.9775 |
| “ | ½ Pt. | 42 | 2.625 | 86 | 2.2575 |
| Old Hermitage | Qt. | 9 | 2.2500 | 90.4 | 2.0340 |
| Old Crow | Qt. | 2 | .5000 | 100 | .5000 |
| Black & White | Fifth | 2 | .4000 | 86.8 | .3472 |
| Mint Springs | Pt. | 16 | 2.000 | 80 | 1.6000 |

Plaintiff's Exhibit No. 1—(Continued)

| | | | | | | |
|--------------------------|-------|----|-------|--------|-------|--------|
| Mint Springs | ½ Pt. | 53 | ..... | 3,3125 | 80 | 2,6500 |
| Old Harbor | Pt. | 32 | ..... | 4,000 | 80 | 3,2000 |
| “ | ½ Pt. | 40 | ..... | 2,5000 | 80 | 2,000 |
| Barclay's | Qt. | 36 | ..... | 9,000 | 80.6 | 7,254 |
| “ | Pt. | 23 | ..... | 2,8750 | 80.6 | 2,3173 |
| “ | ½ Pt. | 36 | ..... | 2,2500 | 80.6 | 1,8135 |
| Royal Oak | Qt. | 10 | ..... | 2,5000 | 80.6 | 2,0150 |
| “ | Pt. | 27 | ..... | 3,3750 | 80.6 | 2,7202 |
| “ | ½ Pt. | 53 | ..... | 3,3125 | 80.6 | 2,6699 |
| Old Mr. Boston Gin | Qt. | 3 | ..... | .7500 | 90 | .6750 |
| “ | Pt. | 24 | ..... | 3,0000 | 90 | 2,7000 |
| “ | ½ Pt. | 16 | ..... | 1,0000 | 90 | .9000 |
| Pembroke's Gin | ½ Pt. | 27 | ..... | 1,6875 | 90 | 1,5187 |
| Rittenhouse Rye | Fifth | 4 | ..... | .8000 | 100 * | .8000 |
| Rona Brandy | Fifth | 11 | ..... | 2,2000 | 84 | 1,8480 |
| Sevilla Rum | Fifth | 22 | ..... | 4,4000 | 86 | 3,7840 |
| Seagram's | Fifth | 19 | ..... | 3,8000 | 86.8 | 3,2984 |
| “ | Pt. | 8 | ..... | 1,0000 | 86.8 | .8680 |
| “ | ½ Pt. | 10 | ..... | .6250 | 86.8 | .5425 |
| Old Mr. Boston Gin | ½ Pt. | 48 | ..... | 3,000 | 90 | 2,7000 |
| Cavalier Gin | ½ Pt. | 12 | ..... | .7500 | 85 | .6375 |
| Diplomat | Pt. | 24 | ..... | 3,0000 | 100 | 3,0000 |

Plaintiff's Exhibit No. 1—(Continued)

| | | | | | | |
|------------------------|-------------|-----------------------|-------|--------|-----|-----------|
| Montrose | Pt. | 23 | ..... | 2.8750 | 86 | 2.4725 |
| " | 1/2 Pt. | 48 | ..... | 3.0000 | 86 | 2.5800 |
| Padre Port Wine..... | Qt. | 3 | ..... | 7500 | 20% | |
| Roma Muscatel | Qt. | 4 | ..... | 1.0000 | 20% | |
| Roma Port Wine | Gallon | 2 | ..... | 2.0000 | 20% | |
| Roma Claret Wine | Fifth | 11 | ..... | 2.2000 | 13% | |
| 17 Cases Pts. Beer | 1 Case Qts. | .0967 and two barrels | 2.000 | | | |
| Total beer | 3.333 | | | | | 112.28872 |

WINE

| | Quantity | Wine Gallons | |
|------------------------|----------|--------------|-----|
| Padre Port Wine Qt. | 3 | .7500 | 20% |
| Roma Muscatel Qt. | 4 | 1.0000 | 20% |
| Roma Port Gallon | 2 | 2.0000 | 20% |
| | | 3.75000 | |
| Roma Claret Wine Fifth | 11 | 2.2000 | 13% |

BEER

| | Barrells | |
|----------------|----------|-----------|
| 17 cases pints | 1.2342 | 12 ounces |
| 1 Case quarts | .0967 | 32 ounces |
| 2 barrells | 2.0000 | |
| | 3.3309 | |

That on December 21, 1943 an exhibit marked Plaintiff's Exhibit No. 2 was admitted in evidence on behalf of the Libellant United States of America upon the trial herein in the words and figures following, to-wit:

To be prepared in Triplicate Duplicate

First Read Carefully Instructions Furnished by the Collector of Internal Revenue

Date Received by
Collector

Form 758
Treasury Department
U. S. Internal Revenue
(Revised 1942)

To Be Filled in by the Collector

Received with
Remittance
Nov 30 1942
Helena, Mont.

Collector Internal Revenue

| | | | |
|-------------|------|------|----------|
| Dec 2 1942 | List | Page | Line |
| Amount due | | | 5107 |
| Amount paid | | | \$228.51 |
| | | | \$228.51 |

District Supervisor
Alcohol Tax Unit
Seattle, Wash.

| | |
|-----------------|----|
| Amount assessed | \$ |
| Checked by | |

Return of Floor Stocks Tax on Distilled Spirits, Malt Liquors, and Wines
Under the Revenue Act of 1942

[In pencil] :
9 - Silver Bow

Plaintiff's Exhibit No. 2—(Continued)

| | | |
|--------------------|---|---|
| Name of Taxpayer: | Charles Moutrey, Joe Boyle, Edward Haft (The Atlas) | To Collector of Internal Revenue at— |
| | (Give last name first) | Helena, Montana |
| Place of Business: | 137 East Park Street | (City) (State) |
| | (Street) | |
| | Butte, Montana | (To be filled in by the Collector when blanks |
| | (City or town) | are distributed) |
| Class of Business: | Retail Liquor Dealer | "Audited [Illegible] 1-9-43" |
| | (To be filled in by Taxpayer) | Clerk Date |

The following, together with the accompanying inventory is a full and true return of all distilled spirits, malt liquors, and wines of any description which were on *November 1, 1942 (the date specified in the Revenue Act of 1942 for the imposition of the floor stocks tax), owned by the above-named taxpayer and held at the place named above, or stored elsewhere, or in transit to or from such taxpayer, and intended for sale or for use in the manufacture or production of any article intended for sale, and of the floor stocks tax due thereon:

*Date to be inserted by person executing this return. Such date will be found in the Collector's instructions which were mailed with this form.

| | | | | | |
|---|----------|-----------|----------|----------|---------|
| 1. Distilled spirits (proof gallons) | *112.887 | 112.28872 | 2.00 | \$224.58 | *225.78 |
| 2. Malt liquors (barrels) | *3.330 | 3.330 | 1.00 | 3.33 ✓ | * 3.33 |
| 3. Wines containing 14% alcohol or less (gallons) | *2.20 | 2.20 | .10-02c* | .22 ✓ | * .05 |
| 4. Wines containing 14% to 21% alcohol (gallons) | *3.75 | 3.75 | *.10 | .38 | *.38 |
| 5. Wines containing 21% to 24% alcohol (gallons) | | | | | |
| 6. Champagne and sparkling wines (½ pints or fractions thereof) | | | | | *229.54 |
| 7. Artificially carbonated wines (½ pints or fractions thereof) | | | | | |

* Figures in pencil.

[In pencil]: (\$1.03 Short)

(Signed)

EDWARD HART

Partner
(State whether individual owner, member of firm, or, if

officer of corporation, give title)

Plaintiff's Exhibit No. 2—(Continued)

Joe Boyle, Charles Moutrey, and Edward Haft
Firm Name Atlas Bar
Address 137 East Park Street, Butte Montana

Retail Liquor Dealer Stamp No. 167749

Inventory of Tax Paid ^{Distilled Spirits} held and intended for sale or
^{Branches} ^{Wines} for use in the Manufacture of any Article intended for sale and de-
clared subject to Federal Floor Stock Tax ~~October 1, 1911.~~
Nov 1—1942

| Kind | Number of Cases | Size of Bottle | Number of Bottles | Wines Gallons per Case or Bottle | Wine Gallons | Proof | Proof Gallons |
|-------------------|--------------------|-------------------|-------------------------|--|--------------|-------|---------------|
| Century Club | | Qt. | 14 | ..... | 3.5000 | 90% | 3.1500 ✓ |
| " | | Pt. | 25 | ..... | 3.1250 | 90 | 2.8125 ✓ |
| " | | Pt. | 13 | ..... | 1.6250 | 86 | 1.3975 ✓ |
| Cream of Kentucky | | 1/2 Pt. | 61 | ..... | 3.8125 | 86 | 3.2787 ✓ |
| " | | Fifth | 6 | ..... | 1.2000 | 85 | 1.0200 ✓ |
| Kessler | | Pts. | 15 | ..... | 1.87500 | 85 | 1.5938 ✓ |
| " | | 1/2 Pt. | 64 | ..... | 4.0000 | 85 | 3.4000 ✓ |
| " | | Qt. | 12 | ..... | 3.0000 | 90.4 | 2.7120 ✓ |
| Old Sunnybrook | | Pt. | 52 | ..... | 6.5000 | 90.4 | 5.8760 ✓ |
| " | | 1/2 Pt. | 58 | ..... | 3.625 | 90.4 | 3.2770 ✓ |

Plaintiff's Exhibit No. 2—(Continued)

| Kind | Number of Cases | Size of Bottle | Number of Bottles | Wines Gallons per Case or Bottle | Wine Gallons | Proof | Proof Gallons |
|-----------------------|--------------------|-------------------|-------------------------|--|--------------|-------|---------------|
| Old Taylor | | Qt. | 2 | ..... | .5000 | 100 | .5000 ✓ |
| “ | | Pt. | 31 | ..... | 3.8750 | 100 | 3.8750 ✓ |
| Old Grandad | | Qt. | 18 | ..... | 4.5000 | 100 | 4.5000 ✓ |
| “ | | Pt. | 62 | ..... | 7.7500 | 100 | 7.7500 ✓ |
| Old Oscar Pepper..... | | Fifth | 12 | ..... | 2.4000 | 86 | 2.0640 ✓ |
| “ | | Pt. | 37 | ..... | 4.6250 | 86 | 3.9775 ✓ |
| “ | | ½ Pt. | 42 | ..... | 2.625 | 86 | 2.2575 ✓ |
| Old Hermitage | | Qt. | 9 | ..... | 2.2500 | 90.4 | 2.0340 ✓ |
| Old Crow | | Qt. | 2 | ..... | .5000 | 100 | .5000 ✓ |
| Black & White | | Fifth | 2 | ..... | .4000 | 86.8 | .3472 ✓ |
| Mint Springs | | Pt. | 16 | ..... | 2.000 | 80 | 1.6000 ✓ |
| “ | | ½ Pt. | 53 | ..... | 3.3125 | 80 | 2.6500 ✓ |
| Old Harbor | | Pt. | 32 | ..... | 4.000 | 80 | 3.2000 ✓ |
| “ | | ½ Pt. | 40 | ..... | 2.5000 | 80 | 2.000 ✓ |
| Barelay's | | Qt. | 36 | ..... | 9.000 | 80.6 | 7.254 ✓ |
| “ | | Pt. | 23 | ..... | 2.8750 | 80.6 | 2.3173 ✓ |
| “ | | ½ Pt. | 36 | ..... | 2.2500 | 80.6 | 1.8135 ✓ |
| Royal Oak | | Qt. | 10 | ..... | 2.5000 | 80.6 | 2.0150 ✓ |
| “ | | Pt. | 27 | ..... | 3.3750 | 80.6 | 2.7202 ✓ |
| “ | | ½ Pt. | 53 | ..... | 3.3125 | 80.6 | 2.6699 ✓ |

Plaintiff's Exhibit No. 2—(Continued)

| Kind | Number of Cases | Size of Bottle | Number of Bottles | Wines Gallons per Case or Bottle | Wine Gallons | Proof | Proof Gallons |
|--|--------------------|-------------------|-------------------------|--|-------------------|----------------|---------------|
| Old Mr. Boston Gin..... | | Qt. | 3 | | .7500 | 90 | .6750 ✓ |
| “ | | Pt. | 24 | | 3.0000 | 90 | 2.7000 ✓ |
| “ | | 1/2 Pt. | 16 | | 1.0000 | 90 | .9000 ✓ |
| Pembroke's Gin | | 1/2 Pt. | 27 | | 1.6875 | 90 | 1.5187 ✓ |
| Witchhouse Rye | | Fifth | 4 | | .8000 | 100 | .8000 ✓ |
| Roma Brandy | | Fifth | 11 | | 2.2000 | 84 | 1.8480 ✓ |
| Sevilla Rum | | Fifth | 22 | | 4.4000 | 86 | 3.7840 ✓ |
| Seagram's | | Fifth | 19 | | 3.8000 | 86.8 | 3.2984 ✓ |
| “ | | Pt. | 8 | | 1.0000 | 86.8 | .8680 ✓ |
| “ | | 1/2 Pt. | 10 | | .6250 | 86.8 | .5425 ✓ |
| Old Mr. Boston Gin..... | | 1/2 Pt. | 48 | | 3.000 | 90 | 2.7000 ✓ |
| Cavalier Gin | | 1/2 Pt. | 12 | | .7500 | 85 | .6375 ✓ |
| Diplomat | | Pt. | 24 | | 3.0000 | 100 | 3.0000 ✓ |
| Montrose | | Pt. | 23 | | 2.8750 | 86 | 2.4725 ✓ |
| “ | | 1/2 Pt. | 48 | | 3.0000 | 86 | 2.5800 ✓ |
| Pale Port Wine..... | Qt. | 3 | | | .7500 | 20% | |
| Roma Muscatel | Qt. | 4 | | | 1.0000 | 20% | |
| Roma Port Wine | Gallon | 2 | | | 2.0000 | 20% | |
| Roma Cletet Wine | Fifth | 11 | | | 2.2000 | 13% | |
| 17 Cases Pts. Beer 1.2342 1 Case Qts. .0067 and two barrels | 2.000 | | | | | | |
| Total beer 3.333 | | | | | | | |
| Total..... | | | | | | | 112.28872 |
| [In pencil] : | | | | | | | 112.8872 |

Plaintiff's Exhibit No. 2—(Continued)

Prepare in Duplicate—Attach Original Copy to Duplicate Copy of Federal Floor Tax Return Form 758. Retain Duplicate in File.
 Certified Correct

U. S. Storekeeper—Gauger
 A. T. U. Inspector

By

Firm Name

Title

This Form Furnished by Courtesy of National Distillers Products Corporation

[Stamped on face of form] : Received With Remittance Nov 30, 1942 Helena, Mont. Collector
 Internal Revenue

WINE

Quantity

Wine Gallons

BEER

Barrells

| | | | | | | | |
|-----------------|--------|---|--------|-------|----------------|-----------|----------|
| Padre Port Wine | Qt. | 3 | .7500 | 20% V | 17 cases pints | 12 ounces | 1.2342 V |
| Roma Muscatel | Qt. | 4 | 1.0000 | 20% V | 1 Case quarts | 32 ounces | .0967 V |
| Roma Port | Gallon | 2 | 2.0000 | 20% V | 2 barrells | | 2.0000 V |

3.3309 V

3.7500

Roma Claret Wine Fifth 11

2.2000

13% V

That on December 21, 1943 an exhibit marked Defendant's Exhibit No. 3 was admitted in evidence on behalf of Intervenors and Claimants Edward Haft and Joseph P. Boyle upon the trial herein in the words and figures following, to-wit: [50]

MONTANA LIQUOR CONTROL BOARD V. L. D. SALES TICKETS.

Pyrolysis

Store No.

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That on December 21, 1943 an exhibit marked Defendant's Exhibit No. 3 was admitted in evidence on behalf of Intervenor and Claimants Edward Haft and Joseph P. Boyle upon the trial herein in the words and figures following, to-wit: [50]

That on December 21, 1943 the Motion To Dismiss of Intervenor and Claimants was filed herein in the words and figures following, to-wit:

[Title of District Court and Cause.] [52]

MOTION TO DISMISS

Come now Edward Haft and Joseph P. Boyle, co-partners doing business as the Atlas Bar, intervenors and claimants herein and move the Court to dismiss the libel of information herein, and to refuse condemnation of the 406 bottles of distilled liquor seized herein on the ground and for the reason:

I.

That the proof by the libelant fails to sustain the allegations of the libel of information for condemnation herein.

II.

That the proof on behalf of the libelant fails to disclose that the floor tax levied by the Revenue Act of 1942 was not paid on any of the liquor described in the libel of information herein on the 20th day of April, 1943, the date of seizure.

III.

That the proof of the libelant discloses that all of the distilled spirits seized on April 20th, 1943, were at the time and place of seizure fully tax paid.

IV.

That the proof of the libelant herein rests upon speculation and conjecture and suspicion. [53]

V.

That there is no just or legal cause shown herein for the seizure or withholding from these intervenors and claimants of the distilled spirits described in the information or libel herein.

EARLE N. GENZBERGER

Attorney for Intervenors and
Claimants.

[Endorsed]: Filed Dec. 21, 1943. C. R. Garlow,
Clerk. [54]

That on December 23, 1943 an Entry was made in the Minutes of said District Court concerning the signing of written Findings of Fact and Conclusions of Law and the signing of Decree herein, and the direction of said District Court to file and enter said Findings of Fact and Conclusions of Law and to file, enter and docket said Decree, in the words and figures following, to-wit: [55]

[Title of District Court.]

15th day October Term 1943.

Thursday, December 23, 1943.

2:30 P. M. Court convened pursuant to order.

Present: Honorable James H. Baldwin, Judge.

No. 110

United States vs. 406 Bottles of Distilled Liquor.

Herein, the Court this day signed its written Findings of Fact and Conclusions of Law and ordered that the same be filed and entered of record.

Thereupon, a decree as presented by Mr. R. Lewis Brown, Assistant United States District Attorney, was signed by the Court and ordered filed, entered and docketed.

Court thereupon suspended until such time as the further business of the Court shall require it to again resume.

C. R. GARLOW,

Clerk

By H. H. WALKER

Deputy Clerk [56]

That on December 23, 1943 the written Findings of Fact and Conclusions of Law and Order for Decree were filed and entered of record herein in the words and figures following, to-wit:

[Title of District Court and Cause.] [57]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This matter having heretofore been set for trial by the Court for the 21st day of December, 1943, said cause came on regularly for trial before the Court on said day on the issues formed by the Libel of Information, and the Claim and Intervention of Edward Haft and Joseph P. Boyle, also called J. P. Boyle and Joe Boyle, co-partners, doing business under the name of Atlas Bar, and intervening herein because of their claim that they were and are the owners of the distilled liquors, the sub-

ject of the Libel of Information herein; the plaintiff was represented by R. Lewis Brown, Assistant Attorney of the United States, in and for the District of Montana, its attorney, and proctor, and the claimant and intervenor Joseph P. Bolye was present in court and the said claimants Edward Haft and Joseph P. Boyle were represented by their counsel and proctor, Mr. Earle N. Genzberger; thereupon oral and documentary evidence was introduced by and on behalf of the libelant and oral evidence introduced by and on behalf of the said claimants and intervenors Edward Haft and Joseph P. Boyle, and thereafter and upon the closing of the evidence the matter was submitted to the Court for decision and consideration and the Court being fully advised in the premises, makes and orders filed its Findings of Fact and Conclusions of Law as follows: [58]

FINDINGS OF FACT

I.

That at all of the times hereinafter mentioned the claimants Edward Haft and Joseph P. Boyle, also called J. P. Boyle and Joe Boyle, were co-partners doing business under the firm name and style of the Atlas Bar, in those certain premises located at 137 East Park Street, in the city of Butte, county of Silver Bow, state and district of Montana, as retail dealers in alcoholic liquors.

II.

On April 20, 1943, there was seized on land at the said Atlas Bar, 137 East Park Street, in the

city of Butte, county of Silver Bow, state and district of Montana, and within the jurisdiction of this court, by certain officers of the Internal Revenue Service of the United States of America, specially authorized by the Commissioner of Internal Revenue of the United States of America, 406 bottles of distilled liquor, consisting of whiskey, brandy, rum and gin and containing 60.9 proof gallons of alcohol, more or less, because of certain violations of the Internal Revenue laws as follows:

That by virtue of the provisions of Subdivision (j) of Section 2800, Title 26, United States Codes, there became due and payable on the 1st day of November, 1942, a floor stocks tax of \$2.00 on each proof gallon and a proportionate tax at a like rate on all fractional parts of each proof gallon upon all distilled spirits upon which the Internal Revenue tax, imposed by law, had been paid, and which on the 1st day of November, 1942, was held and intended for sale; that the liquor hereinbefore referred to and so seized as aforesaid is specifically described in Paragraph III of the First affirmative defense set out in the Claim and Intervention of Joseph P. Boyle, also called J. P. Boyle and Joe Boyle, and Edward Haft, filed herein on June 2, 1943. [59]

III.

That all of the liquor so seized and specifically described was on November 1, 1942, held by the claimants Edward Haft and Joseph P. Boyle, also called J. P. Boyle and Joe Boyle, as co-partners doing business under the name of the Atlas Bar,

and by them and each of them intended for sale at that time, and that at all of the times thereafter the said premises at 137 East Park Street, in the city of Butte as aforesaid, were used and occupied by the claimants, the said Edward Haft and Joseph P. Boyle, also called J. P. Boyle and Joe Boyle, as a saloon and a place where distilled spirits, upon which the Internal Revenue tax of the United States was imposed, were held, intended for sale and sold for beverage purposes, that such business was carried on under the name and style of the Atlas Bar at all of said times.

IV.

That on April 20, 1943, certain Internal Revenue Officers of the United States of America went into the said premises at 137 East Park Street, in the city of Butte, in the state and district of Montana, known as the Atlas Bar, and found therein and upon said premises certain distilled spirits in bottles on which the above named floor stocks tax was imposed and upon which the said floor tax had not been paid, and in addition found therein and in the said place of business certain other quantities of distilled spirits in bottles, and that such of said distilled spirits in bottles, on which said floor tax had been imposed and had not been paid and which were then in said Atlas Bar at said address on the said 20th day of April, 1943, were there kept, maintained and had by the claimants Edward Haft and Joseph P. Boyle, also known as J. P. Boyle and Joe Boyle, for the purpose of being sold and re-

moved by the said last named persons who were then and there the owners thereof and the persons operating the said business in fraud of the Internal Revenue law of the United States of America and with [60] design to avoid payment of the floor stocks tax levied and assessed upon such distilled spirits, and that by reason thereof and of the provisions of Section 3720, Title 26 of the United States Codes such distilled liquors and all other distilled liquors in the place of business specifically described in Paragraph III of the First Affirmative Defense of the claimants Joseph P. Boyle, also called J. P. Boyle and Joe Boyle, and Edward Haft, filed herein on June 2, 1943, became subject to seizure and forfeiture to the United States of America, and the same and the whole thereof were immediately seized by said officers of the Internal Revenue of the United States and taken into their possession and custody and that the same now are in their possession and custody at Butte, Montana.

V.

The Court finds generally each and all of the issues presented by the pleadings on file herein in favor of the libelant and against the libelee and claimants Joseph P. Boyle, also called J. P. Boyle and Joe Boyle, and Edward Haft.

From the foregoing facts the Court draws the following:

CONCLUSIONS OF LAW

I.

That this Court has jurisdiction of this proceeding and of the subject matter thereof and of the libelant, the libelee and said Edward Haft and Joseph P. Boyle, also called J. P. Boyle and Joe Boyle.

II.

That the 406 bottles of distilled liquor, the libelee herein, and particularly described in Paragraph III of the first affirmative defense in the claim and intervention of the said Edward Haft and Joseph P. Boyle, also called J. P. Boyle and Joe Boyle, was on the 20th day of April, 1943, subject to seizure under the provisions of Section 3720, Title 26, United States Codes, and was rightfully and lawfully seized by the officers and agents of the Internal Revenue Department of the United States so seizing the same, and the same and each and all of the same are forfeited to the United States of America, the libelant herein.

III.

That the libelant herein is entitled to all of the relief prayed for in its libel of information for condemnation filed herein on May 25, 1943, and is entitled to a decree of this court declaring all of said distilled spirits and liquors forfeited to the United States and to be disposed of by the Secretary of the Treasury of the United States and by law as provided, and is further entitled to a judg-

ment for its costs against the said Edward Haft and Joseph P. Boyle, also called J. P. Boyle and Joe Boyle.

Let decree be entered accordingly.

JAMES H. BALDWIN

Judge.

[Endorsed]: Filed Dec. 23, 1943, C. R. Garlow, Clerk. [62]

That on December 23, 1943, the Decree was filed and entered herein in the words and figures following, to-wit:

[Title of District Court and Cause.] [63]

DECREE

Herein a Warrant of Arrest and Monition, directing that the United States Marshal for the District of Montana seize 406 bottles of distilled liquor, described therein and in the libel of information for condemnation herein, and give notice thereof by publication in one issue of the Montana Labor News, a newspaper of general circulation, printed and published at Butte, Montana, and most likely to give notice to claimants, and by posting a copy of said Notice of Seizure in the most public manner at or near the place of trial, having been issued out of the above entitled court, in the above entitled cause on the 25th day of May, 1943, and delivered to the United States Marshal for the District of Montana, for execution, and it appearing

from the return of said United States Marshal, endorsed on said Warrant of Arrest and Monition, so issued, as aforesaid and the proof of publication attached thereto, that, acting thereunder, he attached 406 bottles of distilled liquor, consisting of whiskey, brandy, rum and gin, on May 25, 1943, and caused notice of such seizure to be given by publication in one issue of the Montana Labor News, a newspaper of general circulation, published at Butte, Montana, and posting a copy of said Notice of Seizure in the most public manner at the Federal Building in the city of Butte, that being the place of trial, more than fourteen days prior to the return day specified in said Notice of Seizure. [64]

And it appearing that prior to the return date herein one Edward Haft and one Joseph P. Boyle, also called J. P. Boyle and Joe Boyle, co-partners doing business under the name of Atlas Bar, claiming to be the owners of the said 406 bottles of distilled liquor, filed their answer herein to the said libel of information and the matter came on regularly to be heard before the Court on the 21st day of December, 1943, upon the issues as made by the said libel of information, the answer and claim of the said Edward Haft and Joseph P. Boyle and the reply thereto of the libelant; libelant was represented by R. Lewis Brown, Assistant Attorney of the United States, in and for the District of Montana, and the said claimants Edward Haft and Joseph P. Boyle, as co-partners, were represented by their counsel and proctor, Earle N. Genzberger,

said Joseph P. Boyle, being also present in court, and thereupon oral and documentary evidence was submitted by and on behalf of the libelant and the said claimants, and the evidence having been closed, the cause was submitted to the Court for consideration and decision, and thereupon the Court being fully advised in the premises, did on the 23rd day of December, 1943, make and ordered filed and entered its Findings of Fact and Conclusions of Law, which said Findings of Fact and Conclusions of Law, so filed and entered in the office of the Clerk of the Court as aforesaid, are hereby referred to and by such reference hereof made a part as though set out herein in full.

Wherefore, by reason of the law and the evidence and the Findings of Fact and Conclusions of Law of the Court and the premises, It Is Ordered, Adjudged and Decreed and this does order adjudge and decree that the said 406 bottles of distilled liquor heretofore seized be and the same hereby is condemned and forfeited to the United States of America, libelant; that the United States Marshal for the District of Montana turn over and deliver to the Secretary of the Treasury of the United States, [65] or his duly authorized agent, to be disposed of by the said Secretary of the Treasury as provided by law.

It Is Further Ordered and Adjudged that the libelant herein do have and recover of and from said Edward Haft and Joseph P. Boyle, co-partners as aforesaid, its costs herein incurred and hereby taxed in the sum of \$32.08.

Done and dated December 23, 1943.

JAMES H. BALDWIN

Judge.

[Endorsed]: Filed Dec. 23, 1943, C. R. Garlow,
Clerk. [66]

That on December 23, 1943, the Notice of Entry of Judgment was filed herein in the words and figures following, to-wit:

[Title of District Court and Cause.] [67]

NOTICE OF ENTRY OF JUDGMENT

To: Edward Haft and Joseph P. Boyle, and to
Earle N. Genzberger, their attorney:

You and Each of You Are Hereby notified that a decree in the above entitled cause in favor of the libelant and against the libelees above named was duly and regularly given and made by the Court and ordered entered and filed in the office of the Clerk of the above entitled court on the 23rd day of December, 1943, a copy of which decree is herewith served upon you.

R. LEWIS BROWN

Assistant Attorney of the
United States, in and for
the District of Montana.

Attorney for Libelant.

Service of the foregoing and receipt of a true and correct *copy and receipt of a true and correct* copy of the decree, findings of fact and conclusions of law and cost bill acknowledged this 23rd day of December, 1943.

EARLE N. GENZBERGER

Attorney for Claimants Edward Haft and Joseph P. Boyle.

[Endorsed]: Filed Dec. 23, 1943, C. R. Garlow, Clerk. [68]

That on December 31, 1943, the Motion for Rehearing, New Trial, or Review of Intervenor and Claimants was filed herein in the words and figures following, to-wit:

[Title of District Court and Cause.] [69]

MOTION FOR REHEARING, NEW TRIAL,
OR REVIEW

To The Honorable James H. Baldwin, Judge of
The District Court of The United States For
The District of Montana:

Come now, Joseph P. Boyle and Ed Haft (co-partners doing business under the name of "Atlas Bar"), intervenors and claimants herein and move the above-entitled Court and the Honorable Judge thereof, to grant to these intervenors and claimants a review, rehearing, or new trial of the above-entitled cause or to grant such other relief to these

intervenor and claimants as to the Court may seem proper in the premises, from that certain judgment and Decree heretofore given and made in the above-entitled proceedings on December 23, 1943, and to set aside and vacate the Findings of Fact and Conclusions of Law heretofore made herein, on the following grounds and for the following reasons, to-wit:

1. Irregularity in the proceedings of the Court and of the adverse party by which these intervenors and claimants were prevented from having a fair trial.

(a) In that the United States Attorney, as Attorney for the Libelant, did not join with the Attorney for claimants and intervenors in moving for a vacation of the setting of said cause for trial, or a continuance of the date thereof by reason of the fact that libelant and these claimants and intervenors had pre- [70] viously agreed upon a settlement and compromise of said action.

(b) Irregularity in the proceedings of the Court in refusing to recognize the compromise and settlement made by the intervenors and claimants with the officers of the libelant, and in insisting that said cause be tried regardless of said compromise and settlement.

(c) Enforcing these intervenors and claimants to proceed with the trial of the action without the presence of the claimants and intervenors and without the presence of their witnesses.

(d) In dismissing witness C. D. McGarry from

the witness stand before he had concluded his testimony.

(e) In refusing to intervenors and claimants a recess of the trial for an hour and a half to 4:30 o'clock P. M. on Tuesday, December 21st, 1943, or to 10:00 A. M. on December 22, 1943, in order to enable Ed Haft, principal witness of the intervenors and claimants to be present and to testify.

2. Accident or surprise which ordinary prudence could not have guarded against in that these intervenors and claimants had, prior to the setting of the case for trial settled and compromised said action with the libelant and had paid all moneys demanded of them by the libelant to settle and compromise said cause.

3. Surprise on the part of these claimants and intervenors in that the libelant and the Court insisted on compelling these intervenors and claimants to proceed to the trial of this action after the settlement and compromise had been made and after all things required by said settlement and compromise of these intervenors and claimants to be done, had by them been done.

4. Excusable neglect on the part of these intervenors and claimants and their attorney in failing to prepare for trial after said case had been settled and compromised with the libelant and in the assumption by the attorney for these claimants and intervenors that said cause would not be brought on for trial upon the merits but assuming that a motion for the dismissal of the action would be made by the libelant. [71]

5. Abuse of discretion on the part of the Court in compelling these claimants and intervenors to proceed to trial under the circumstances set forth in the *proceeding* paragraphs of this motion, without the presence of these claimants and intervenors in the courtroom and particularly without the presence and attendance of claimant and intervenor, Ed Haft, the principal witness for claimants and intervenors.

6. Abuse of discretion on the part of the Court in dismissing witness C. D. McGarry from witness stand before counsel for intervenors and claimants had concluded examination and before cross-examination by the libelant.

7. Abuse of discretion on the part of the Court in refusing to recess the trial for an hour and a half to secure the testimony of witness Ed Haft who was absent from the city when the trial commenced, and who returned to Butte from Missoula, Montana, immediately upon learning that the case was on trial.

8. Errors of law occurring at said trial, excepted to by claimants and intervenors:

(a) Refusal of Court to continue the cause on motion of counsel for claimants and intervenors.

(b) Dismissal by Court of the motion of intervenors and claimants made at the close of the Government's case to dismiss the proceedings.

(c) Decree forfeiture of the 406 bottles of distilled spirits named as libelees in this action.

This motion is made and will be based upon the pleadings in the case, the papers on file, upon the

minutes of the Court, and the affidavits of Ed Haft, Earle N. Genzberger, Joseph P. Boyle, and C. D. McGarry filed herewith.

Dated December 31, 1943.

EARL N. GENZBERGER

Proctor and Attorney for Claimants and Interveners, Joseph P. Boyle and Ed Haft as co-partners doing business under the name of the "Atlas Bar." [72]

Service of the foregoing motion for new trial acknowledged and copy thereof received this 31st day of December, 1943.

JOHN B. TANSIL

United States Attorney.

R. LEWIS BROWN

Assistant United States Attorney.

Attorney for Libelant.

[Endorsed]: Filed December 31, 1943. [73]

That on December 31, 1943, the Affidavit of Earle N. Genzberger was filed herein in the words and figures following, to-wit:

[Title of District Court and Cause.] [74]

AFFIDAVIT OF EARLE N. GENZBERGER

State of Montana,

County of Silver Bow—ss.

Earle N. Genzberger, being first duly sworn, deposes and says:

I am the attorney for Joseph P. Boyle and Ed Haft, doing business as the "Atlas Bar" and the intervenors and claimants named in the above-entitled action.

Said claimants and owners consulted me immediately after the seizure of the libelees, to-wit: 406 bottles of distilled liquor at 137 East Park Street, Butte, Montana, on or about April 20th, 1943.

That said claimants and intervenors contended strenuously from the beginning that all Government taxes upon all of the liquor seized had been paid in full long prior to the seizure and on April 24th, 1943, I filed in the above-entitled Court in Cause No. 109, a petition for return of seized property which said petition was thereafter by the Court dismissed for want of jurisdiction.

That thereafter the present libel was filed and on behalf of said intervenors and claimants this affiant filed a "Claim and Intervention of owners and answer to Libel", and thereafter twice unsuccessfully attempted to have the proceeding set for trial.

Prior to October 20th, 1943, this petitioner was notified [75] that this case had been placed in the charge of Assistant United States Attorney Roy F. Allan, of the Billings office of the United States Attorney, and in October, 1943 officials of the Treasury Department, Internal Revenue Service, Alcohol Tax Unit, informed affiant that Mr. Roy F. Allan, Assistant United States Attorney, had authority from the Attorney General of the United

States to settle all pending actions, such as the case at bar.

And on or about October 19th, 1943, said Assistant United States Attorney referred affiant to Mr. D. E. Deneen, investigator in charge of the Alcohol Tax Unit, in order that a computation might be made by Mr. Deneen of the amount of money required by the Treasury Department, to settle and compromise the matters involved herein.

That at the said conference had with Mr. Deneen on or about October 20th, 1943, the amount of Four hundred forty-six and 26/100 (\$446.26) Dollars was demanded of the claimants in addition to additional taxes of which they were to be advised later. That Assistant U. S. Attorney Allan was informed of such compromise and orally confirmed the same.

That Mr. Deneen thereupon agreed to prepare and transmit the appropriate papers to affiant for delivery to and completion by the clients of this affiant, and on October 22, 1943, affiant received in the course of United States mail the following letter from Mr. Deneen:

Treasury Department
Internal Revenue Service
Alcohol Tax Unit

Office of

Investigator in Charge

In Reply Refer to: E:IC:DED.

Montana-575. (Floor Stocks Tax)

Helena, Montana,
October 21, 1943.

Mr. Earle N. Genzberger
Attorney at Law
Lewisohn Building
Butte, Montana.

Dear Mr. Genzberger: [76]

In accordance with our conversation at Butte, Montana, October 20, there is transmitted herewith Offer in Compromise in triplicate to be accomplished by your clients in the "Atlas Bar" case, Butte, Montana.

It is not necessary that the offer be signed by Boyle, Haft and Moutrey. If signed by Boyle and Haft it will be sufficient.

Certified check or bank draft in amount of \$446.26 made payable to the Treasurer of the United States to be attached to the offer which should be delivered to Assistant United States Attorney R. Lewis Brown, Butte. As a matter of record for this office, please advise when you deliver the offer with remittance to Mr. Brown.

As explained to you yesterday the amount of the

offer \$446.26 represents 50 percent of the value of 60.97 proof gallons of distilled spirits or \$892.52.

Additional floor stocks tax due on the undeclared liquor will be set up for assessment and you will be advised as to the amount due.

Yours very truly,

D. E. DENEEN

Investigator in Charge.

mn/encl.

That upon receipt of said letter, affiant delivered to Assistant U. S. Attorney, R. Lewis Brown, at Butte, Bank Draft for \$446.26 on behalf of said claimants and intervenors.

That thereafter and within the course of the following week, affiant received from Roy F. Allan, Assistant U. S. Attorney, what purported to be a copy of letter he had written to the Attorney General of the United States relative to this case, which read as follows:

Billings, Montana

October 26, 1943

The Attorney General
Department of Justice
Washington, 25, D.C.

Re: Alcohol Tax Unit

Case No. Montana-575

Joseph P. Boyle, et al.

Atlas Bar, Butte, Montana

(Floor Stocks Tax)

Dear Sir: [77]

The Helena office of the Alcohol Tax Unit reported the above-captioned case to this office on May 14, 1943.

An analysis of the facts of the case show that it was questionable whether or not a successful prosecution could be had in the District Court of the United States, in that the proof was based on speculation and conjecture.

Pursuant to Attorney General's Circular No. 3780, we have entered into negotiations with the defendants for a civil compromise of the case, both as to the tax liability and libel action.

Enclosed herewith you will find a cashier's check on the Miners National Bank of Butte, Montana, numbered 21,952, dated October 22, 1943, payable to the Treasurer of the United States, in the amount of \$446.26, which has been submitted by the defendants as an offer in compromise together with their duplicate statement.

We recommend that this offer and compromise be accepted.

The seized liquor, on which the floor stocks tax was not paid, has not as yet been released because the tax thereon has not been paid to the Collector of Internal Revenue. The defendants have promised that they will pay the tax to the collector within the next few days. As soon as they do their liquor will be released to them.

Respectfully,

JOHN B. TANSIL

United States Attorney

ROY F. ALLAN

Assistant U. S. Attorney

RFA:nm

Enclosures 3

cc: R. Lewis Brown, Butte, Montana
D. E. Deneen, Helena, Montana
Earle Genzberger, Butte, Montana

That prior to November 16th, affiant received a form of amended tax return from Mr. D. E. Deneen, investigator in charge of the Alcohol Tax Unit of the Treasury Department from Helena, Montana, calling for an additional tax from the claimants and intervenors herein in the amount of Three hundred ninety-five and 76/100 (\$395.76) Dollars which was necessary in order to complete the compromise and settlement of the above-entitled action.

That affiant secured the execution of the forms by Joseph P. Boyle, one of the intervenors and claimants and also secured from him a bank draft and personally delivered said draft in the amount

of Three hundred ninety-five and 76/100 (395.76) Dollars to [78] Mr. D. E. Deneen for transmission to the proper officers of the libelant on November 16th, 1943.

That on December 14th, 1943, affiant received from the Clerk of the United States Court, a copy of the order setting this case for trial and immediately and on December 14th, 1943, wrote to Mr. Roy F. Allan, Assistant United States Attorney at Billings, Montana, stating that the case had been set for hearing and requesting a continuance of the setting in view of the settlement and compromise.

That under date of December 16th, 1943, said Roy F. Allan, Assistant United States Attorney, wrote to affiant that he had re-submitted the offer and compromise of both civil and criminal liability to the Attorney General with the recommendation that the offer and compromise be accepted and that he would advise me further.

In view of the foregoing facts, I expected the United States Attorney to join with me in a request to the Court to continue the case for trial or to vacate the setting and did not anticipate a trial of said action on December 21, 1943. I, therefore, did not notify either Mr. Boyle nor Mr. Haft of the setting of the case for trial, did not subpoena any witnesses, and was not prepared to try said case upon said date.

That I had been ill the preceeding week and had not recovered at the time of the setting of the case for trial and in anticipation of a definite word from

the United States Attorney's office I did not take the opportunity to call upon the Court prior to the morning of December 21, 1943.

I neglected to place this matter upon my office calendar as an engagement for Tuesday morning, December 21, 1943, and when I reached the United States courtroom after receiving a telephone call from the United States Attorney, at about 10:12 on Tuesday morning, December 21, I had found that the matter had been recessed until 10:30 A. M. and still felt that the United States Attorney [79] would join in a request for the vacation of the setting of the case for trial, or for a continuance thereof.

When the Court insisted upon proceeding to trial with the action, I was compelled to proceed to trial without clients or witnesses and during a recess, I succeeded in having third parties notify Mr. Boyle, and I learned that Mr. Haft was in the city of Missoula, where I reached him over the long distance phone about 12:30 P. M. Haft promised to hurry back to Butte and I so informed the Court but the Court refused to grant any recess and as a consequence I was unable to properly present the case of the claimants and owners herein and said claimants and owners were prevented from having a fair trial of the issues in this action, and had no opportunity to present properly their contentions to the Court herein.

That during the course of the trial I called witness T. D. McGarry, who prepared the original floor tax returns upon which this action was based.

That I intended to show by Mr. McGarry, that the inventory "Exhibit No. 5", from which he was testifying contained three entries of gin: one—"80 proof, 3 quarts, 24 pints, and 16 half pints," and that on the final return he changed the return of 80 proof gin to 90 proof gin and called the same "Old Boston", whereas there was no name on original inventory. Another gin entry was "gin 85 proof 12 half pints." The third was "Gin, 'Old Boston', 90 proof, 48 half pints."

I also proposed to show by the witness, McGarry that he had the original instructions from the Treasury Department given to taxpayers making floor tax returns as to liquor stocks held November 1st, 1942, and that such instructions did not call for the name of the brands of distilled liquors or of gins to be entered on the returns form 358.

McGarry would have also testified that said "Exhibit 5" has been in his possession ever since the receipt of same in the month [80] of November, 1942, and that he had made no changes thereon.

That the testimony of Ed Haft would have shown that he had prepared the inventory which was offered in evidence as "Exhibit 5" and that the same was in his handwriting and that it contained a list of all intoxicating liquor on the premises at 137 East Park Street after midnight of October 31st, 1942 and early morning of November 1st, 1942 when it was taken.

Haft also said he would have testified that if any errors occurred, said errors were unintentional or clerical and were not made with any intent whatever

to defraud the United States of any tax and that the error in misnaming the brand of the gin which was included on the inventory and which was included in Government's "Exhibits 1 and 2" and upon which the tax was paid, resulted in an overcharge to and over payment by claimants and intervenors of twelve and one-half per cent ($12\frac{1}{2}\%$) more on the gin in question than these claimants and intervenors should have paid.

That this affiant for the reason hereinbefore given had not notified either Ed Haft or Joseph P. Boyle that the Court had set the case for trial on December 21st, 1943, and so far as affiant knows neither of the said claimants and intervenors had knowledge thereof prior to affiant's informing them of the trial on the date of the trial itself.

EARLE N. GENZBERGER

Subscribed and sworn to before me this 31st day of December, 1943.

JOHN J. WALSH

Notary Public for the State of Montana. Residing at Butte, Montana. My commission expires Feb. 26, 1946.

Service acknowledged, copy received Dec. 31, 1943.

JOHN B. TANSIL

U. S. Attorney

[Endorsed]: Filed Dec. 31, 1943.] [81]

That on December 31, 1943, the Affidavit of T. D. McGarry was filed herein in the words and figures following, to-wit:

[Title of District Court and Cause.] [82]

AFFIDAVIT OF C. T. McGARRY

State of Montana,
County of Silver Bow—ss.

C. T. McGarry, being first duly sworn, deposes and says:

My name is C. T. McGarry. During the month of November, 1942, I was employed as a part-time accountant by J. J. Walsh, certified public accountant, 43 East Broadway Street, Butte, Montana.

I was called to testify in the above-entitled case. During the course of my examination I was asked with reference to an inventory, which I produced from my file, whether I knew in whose handwriting said inventory was. I replied that I did not.

After an argument, the Judge asked me to leave the witness stand which I did. I was not asked what I did with reference to the inventory. I was not permitted to explain that there was on the inventory the entries:

“Gin 80 proof, 3 quarts, 24 pints, and 16 half pints”, and that on the final return I changed the return of 80 proof gin to 90 proof gin and called the same “Old Boston”, whereas there was no name on original inventory. Another gin entry was “gin 85 proof 12 half pints.” The third was “Gin, “Old Boston”, 90 proof, 48 half pints.” [83]

I also had in my possession the original mimeograph or printed instructions sent out by the Treasury Department in connection with the floor tax returns. These instructions did not call for listing brands of liquor. It was my practice and custom to list the brands for our own convenience in checking the quantities and proofs of the respective liquors.

Had I been permitted to do so I would have also testified that when I came to the entry "gin, 3 quarts, 24 pints, 16 half pints" I could not find on the list in my office an "80 proof Gin" but found later on the inventory "Old Boston" Gin listed as 90 proof and I assumed that the person who made the inventory had made a mistake and I wrote the return:

"Old Boston Gin, quarts 3, pints 24, one half pints 16," and changed the proof from 80 to 90.

My return also was in error in calling "Pembrook Whiskey" "Pembrook Gin", 27½ pints, because there is no "Pembrook Gin", although this mistake made no difference in the tax.

This was an error on my part but resulted in having the taxpayer pay tax upon said forty-three bottles of gin on the basis of 90 proof instead of 80 proof, an increase of 12½%—so that Haft and Boyle actually paid 12½% more tax upon the gin in question than they should have properly paid.

I also found later upon the inventory the entry "192 Bottles of Barclay." this was missed by me on making up the original inventory because it was

separated from the other inventory by being on another page, and was separated from the balance of the inventory by two or more blank pages.

T. D. McGARRY

Subscribed and sworn to before me this 31st day of December, 1943.

[Notarial Seal] JOHN J. WALSH

Notary Public for the State of Montana, residing at Butte, Montana. My Commission expires Feb. 26, 1946.

Service acknowledged, copy received Dec. 31, 1943.

R. LEWIS BROWN,
Asst. U. S. Attorney

[Endorsed]: Filed Dec. 31, 1943. C. R. Garlow, Clerk. [84]

That on December 31, 1943 the Affidavit of Joseph P. Boyle was filed herein in the words and figures following, to-wit:

[Title of District Court and Cause.] [85]

AFFIDAVIT OF JOSEPH P. BOYLE

State of Montana,
County of Silver Bow—ss.

Joseph P. Boyle, being first duly sworn, deposes and says:

My name is Joseph P. Boyle. I am one of the owners and claimants of the 406 Bottles of distilled

spirits named as libelee in the above-entitled action.

That I was not personally informed that the case had been set for trial until about 11:00 o'clock on the morning of Tuesday, December 21, 1943, when I was informed over the telephone that the trial was then in progress. I was surprised that the trial was in progress because two months previous I had been informed that if I would pay to the Government the sum of \$446.26 and such additional sum as the computation of the Alcohol Tax Unit officials showed to be due for an additional tax, that all pending matters would be fully settled and compromised, and rather than submit to the time and embarrassment and expense of one or more law suits, I consented to the settlement and compromise, and on October 22, 1943, paid to the Government \$446.26, and thereafter I signed an amended return prepared by the Internal Revenue Department, and with that paid the additional sum of \$395.76. Both of said sums have been retained by the libellant.

That immediately upon learning that the case was set [86] for trial, I tried to find the principal witness, my co-claimant and intervenor, Ed Haft, and learned that he was in the city of Missoula in the course of his employment by the Kitto Transfer Company.

I had no intention of evading any floor tax due from the "Atlas Bar" for distilled spirits on hand for sale on November 1st, 1942, and any errors, if any there were, were honest mistakes, were unintentional, and were not made with the intent to defraud the United States.

JOSEPH P. BOYLE

Subscribed and sworn to before me this 31st day of December, 1943.

[Notarial Seal] JOHN J. WALSH

Notary Public for the State of Montana, residing at Butte, Montana. My Commission expires Feb. 26, 1946.

Service acknowledged, copy received Dec. 31, 1943.

JOHN B. TANSIL

U. S. Attorney

R. LEWIS BROWN

Asst. U. S. Attorney

[Endorsed]: Filed Dec. 31, 1943. [87]

That on December 31, 1943 the Affidavit of Ed Haft was filed herein in the words and figures following, to-wit:

[Title of District Court and Cause.] [88]

AFFIDAVIT OF ED HAFT

State of Montana,

County of Silver Bow—ss.

Ed Haft, being first duly sworn deposes and says:

I am one of the intervenors and claimants to the 406 Bottles of Distilled Spirits named as Libelee in the above entitled action. That I did not learn that the said action was set for trial until 12:28 P. M. on Tuesday, December 21, 1943, the date of the trial when my attorney, Earle N. Genzberger of

Butte, reached me over the long distance telephone at Missoula, Montana, approximately one hundred twenty-four (124) miles away from the place of trial to which place I had driven by truck in the course of my employment by the Kitto Transfer Company by whom I'm employed as a truck driver. Mr. Genzberger told me over the phone that the trial of the above-entitled libel was in progress, and I immediately completed the loading of my employer's truck with furniture and household goods and hastened to Butte. I arrived at the Federal Building in Butte about 4:05 P. M. on Tuesday afternoon December 21, 1943, and found the courtroom door locked and went to the Clerk's office and there learned that the case was over. [89]

If I had been permitted to testify as a witness on behalf of myself and partner, intervenors in the above entitled action, I would have testified that I took the inventory of all distilled spirits in the Atlas Bar about midnight of October 31, 1942, and immediately thereafter, and that the inventory (which I understand was offered at the trial as "Exhibit No. 5" for identification), was in my own handwriting and was written by me upon the occasion of taking such inventory.

I would have testified that I listed every bottle of liquor at the Atlas Bar at 137 East Park Street, Butte, Montana, and that I listed all of the gin in said place, and that the tax was paid on all gin that was in our place of business at 137 East Park Street or which we owned and held for purpose of sale.

That I listed on the said inventory "three quarts, twenty-four pints, and sixteen one-half pints of gin, 80 proof."

I also listed "Gin—85 proof, 12 half pints", and Gin "Old Boston, 90 proof, 48 half pints." That was all the Gin on hand at that date.

That I delivered the inventory that I had made to John J. Walsh, a certified public accountant at Butte, Montana, having his office at 43 East Broadway, Butte, Montana, and he later gave me the type-written return which I signed and swore to before him. In signing the return, I did not notice that the accountant had changed the gin which I listed at 80 proof to 90 proof and had given it the name "Old Boston" instead of "Cavalier". On my inventory I did not state any brand of gin.

Had I been allowed to testify, I would have produced also the printed instructions that we received from the Internal Revenue Bureau relative to the floor tax returns on liquor stocks held by us for sale on November 1st, 1942. These printed instructions do not provide for the listing of brands. I put the whiskey brands on my inventory but did so for my own convenience in re-checking the stock, but I did not do this in the case of gin, brandy, rum, wine, beer, with one exception. [90]

I also inventoried sixteen cases of Barclay's whiskey, 80.6 proof which was overlooked by the accountant in making the return, because I had placed the same upon a separate sheet in my inventory.

We never intended to evade any floor tax upon

any of this liquor, and I never had the discrepancy called to my attention until after these proceedings were instituted.

I have been surprised that this case was set for trial because on or about October 20th, 1943, through my attorney, the United States Attorney's Office and the officials of the Alcohol Tax Unit offered us a complete compromise and settlement of all pending matters upon the payment of Four hundred forty-six and 26/100 (\$446.26) Dollars in addition to the payment of a tax which the Alcohol Tax Unit had computed as being due from us. My partner and I paid this money on or about October 22, 1943, and thereafter my partner signed the amended tax return prepared for us by the officials of the Alcohol Tax Unit and at that time we paid an additional tax to the United States amounting to Three Hundred ninety-five and 76/100 (\$395.76) Dollars.

We, therefore, assumed that the above-entitled and numbered case had been fully settled and compromised with the Government of the United States, the libelant herein, and were not prepared on Tuesday, December 21, 1943, for the trial of said action.

This affidavit is made for the purpose of obtaining a new trial, a re-hearing, or review of the judgment heretofore given and made in the above entitled action on December 23, 1943, and to relieve this affiant and his partner and co-intervenor, Joseph P. Boyle, herein from the said judgment taken against us and both of us through our inadvertence, surprise, and excusable neglect, caused through

our reliance upon the settlement and compromise made by us with the libelant herein.

ED HAFT [91]

Subscribed and sworn to before me this 31st day of December, 1943.

[Notarial Seal] JOHN J. WALSH

Notary Public for the State of Montana, residing at Butte, Montana. My commission expires Feb. 26, 1946.

Service acknowledged, copy received Dec. 31, 1943.

JOHN B. TANSIL

U. S. Attorney

R. LEWIS BROWN

Asst. U. S. Attorney

[Endorsed]: Filed Dec. 31, 1943. [92]

That on January 4, 1944 the Libelant's Objections to the Motion for Rehearing, New Trial or Review were filed herein in the words and figures following, to-wit:

[Title of District Court and Cause.] [93]

OBJECTIONS TO THE MOTION FOR RE-
HEARING, NEW TRIAL OR REVIEW

Comes now the libelant, United States of America, and objects to the granting by the Court of the motion for rehearing, new trial or review filed herein by Joseph P. Boyle and Edward Haft (co-partners doing business under the name of Atlas

Bar), intervenors and claimants herein, upon the grounds and for the reasons following, to-wit:

1. That no legal reason appears for the granting of said motion, or for a rehearing, new trial or review of the decision of the Court herein.

2. That the motion for such rehearing, new trial or review is on its face insufficient to put the power of the Court in motion, or to support an order granting a rehearing, new trial or review of the said cause.

3. That it appears from the face of the affidavits, filed as a part of the said motion and by the intervenors and their counsel, that any evidence that the said intervenors desire to bring to the attention of the court, if their said motion is granted, was within their knowledge and possession prior to the time of the trial of this cause and at the time the same was set for trial and was not produced at the trial of said cause solely because of the neglect of the said intervenors to appear at the trial and to testify therein and that the essence of the evidence the intervenors desire to bring to the attention of the Court is [94] such that it goes to establish as false and untrue the statements of fact made under oath by Edward Haft, one of the intervenors, in making his return to the Collector of Internal Revenue for the District of Montana, and to establish that the said Edward Haft was guilty of false swearing at said time, and further that if all of said testimony and evidence had been offered at the trial of said cause that is now desired to be offered, the same

would not have been sufficient to have required any decision or judgment different from that entered herein by the Court.

These objections are made and will be based upon the files and records of the above entitled court, upon the minutes of the court, the evidence introduced at the hearing and upon the affidavit of R. Lewis Brown, Assistant Attorney of the United States, in and for the District of Montana, filed herein.

R. LEWIS BROWN

Assistant Attorney of the
United States, in and for
the District of Montana.

Admission of Service, Jan. 4, 1944.

EARLE GENZBERGER

Attorney for Intervenors.

[Endorsed]: Filed Jan. 4, 1944. H. H. Walker,
Clerk. [95]

That on January 4, 1944 the Affidavit of R. Lewis Brown was filed herein in the words and figures following, to-wit:

[Title of District Court and Cause.] [96]

AFFIDAVIT

United States of America,
District of Montana—ss.

R. Lewis Brown, being first duly sworn on his oath, deposes and says:

That he is now and at all of the times hereinafter mentioned has been a duly appointed, qualified and acting Assistant Attorney of the United States, in and for the District of Montana; that as such Assistant Attorney of the United States he has had personal charge of the above entitled cause and personally prepared for filing and filed the libel of information filed herein; that after the filing of the libel of information herein, Earle N. Genzberger, the attorney for the intervenors, discussed with affiant the possibility of the entering into a compromise by the intervenors and the United States of the civil and criminal liability of the intervenors by reason of the seizure of certain liquors proceeded against in this cause, belonging to the intervenors, because of the claimed failure of the said intervenors to pay the floor stocks tax due on the said liquors on the 1st day of November, 1942; that affiant advised the said counsel that the Attorney General of the United States had authority to either make or refuse to make such compromise and further advised the said counsel that if the intervenors cared to make such proposition of settlement and cared to tender a cashier's check for one-half the value of the said liquor so seized, payable to the [97] Treasurer of the United States, affiant would cause said proposition of settlement and cashier's check to be transmitted to the Attorney General of the United States for his action and consideration, and that thereupon the cashier's check, payable to the Treasurer of the United States, in the sum of

\$446.26, was delivered to me by said attorney and that I caused the same to be transmitted to the Attorney General of the United States by and through Mr. Roy F. Allan, Assistant Attorney of the United States, in and for the District of Montana; that said proposed settlement and compromise was not requested or solicited from the said intervenors by the United States Attorney's office of the District of Montana, or any members thereof, or of the Alcohol Tax Unit for the District of Montana, or offered to said intervenors by said officers, but was initiated and solicited by the intervenors themselves.

That thereafter and before the setting of this cause for trial, the Attorney General of the United States refused to accept the said compromise or the said offer in compromise and refused to compromise the civil and or criminal liability of the intervenors as requested and solicited by them, and returned said draft to Mr. Allan for delivery to the intervenors and that Mr. Allan, upon receipt of said draft, thereafter resubmitted the said offer in compromise to the Attorney General of the United States; that affiant was informed by Mr. Earle N. Genzberger that he had received a letter from Mr. Allan, Assistant United States Attorney as aforesaid, informing him that the Attorney General of the United States had refused said offer in compromise and rejected the same and informing him further that he, Mr. Allan, was resubmitting the same to the Attorney General of the United States; that the day after this cause was set for trial, and while affiant was at his lunch, Mr. Genzberger, the

counsel for the intervenors came to the table at which affiant was sitting and informed the affiant that the case had been set for trial. He [98] then asked affiant if he, affiant, would see the presiding Judge and have the case continued. Affiant advised the counsel that he had no intention of interviewing the Judge for the purpose of requesting a continuance of the trial of this cause and further advised the counsel that if he, the counsel, desired the cause to be continued, that if the counsel would come to the affiant's office, that affiant would go with the counsel, if the counsel so desired, to the Court and would inform the Court of the status of the compromise as hereinabove set forth, and would not oppose any motion for a continuance that he desired to make and affiant further informed the counsel that if counsel did not so do that, so far as affiant knew the case would be tried at the date set; that the counsel then informed affiant that he would come up to the affiant's office that same afternoon and would request a continuance of the cause; that although affiant was in his office that afternoon the counsel did not come to affiant's office that afternoon or at any time between the date of the said conversation and the trial of the said cause and that affiant thereby assumed it was the desire of the intervenors to try the said cause at the date set for trial, and prepared for trial of the same and had his witnesses in attendance; that at the date, time and place set for trial of the said cause, to-wit: at 10:00 o'clock on December 21st, 1943, affiant was

present in court with his witnesses ready to proceed to trial, that the Judge came into court at the hour of 10:00 o'clock and the Court was thereupon opened, that the Court called the said cause for trial and that the counsel for the intervenors was not present in court; that affiant thereupon informed the Court that it was his belief that the intervenors desired to contest the said libel and to try the cause and requested the Court to continue the trial of the cause for a short time until affiant could get in touch by telephone with counsel for the intervenors; that the Court thereupon continued the trial of the said cause until the [99] hour of 10:30 o'clock of the same day; that affiant thereupon called the counsel for the intervenors at his office and informed counsel of what had transpired that morning and counsel informed the affiant he had neglected to make a note of the time set for the trial and had forgotten it, but he would immediately come to the federal building; and further affiant sayeth not.

R. LEWIS BROWN

Subscribed and sworn to before me this 4th day of January, 1944.

[Seal]

HAROLD L. ALLEN

Deputy Clerk, United States
District Court, for the Dis-
trict of Montana.

[Endorsed]: Filed January 4, 1944. H. H. Wal-
ker, Clerk. [100]

That on April 14, 1944 an Entry was made in the Minutes of said District Court of the Order In Re: Session of Court to be Held at Butte, Montana, wherein all motions pending undetermined in the Butte Division of said Court were set for hearing at said place on April 22, 1944, in the words and figures following, to-wit:

[Title of District Court.] [101]

54th Day October Term, 1943 Friday April 14, 1944

11:30 A. M. Court convened pursuant to Order

Present: Honorable James H. Baldwin, Judge.

In Re: Session of Court to be Held at Butte, Montana.

ORDER

It Is Ordered, and this does order:

1. That a session of the above entitled court be held at the courtroom thereof in the city of Butte, in the state and district of Montana, commencing at the hour of ten o'clock in the morning on Saturday, April 22, 1944;

2. That all motions pending undetermined in the Butte Division of said court be and the same are hereby set for hearing at that time and place; and

3. That the Clerk of the above entitled Court shall forthwith notify the attorneys for the parties litigant in the matters referred to in the last preceding paragraph, by mail, of the setting of said motions for hearing, as aforesaid.

Court thereupon suspended until such time as the further business of the Court shall require it to again resume.

H. H. WALKER,
Clerk.

By ELAINE E. WILLIAMS
Deputy. [102]

That on April 22, 1944, an Entry was made in the Minutes of said District Court concerning the denial of the Motion for Rehearing, New Trial or Review of Claimants and Intervenor in the words and figures following, to-wit:

[Title of District Court.] [103]

Butte Division Civil Cause No. 110.

United States v. 406 Bottles of Distilled Liquor.

This cause came on regularly for hearing this day on Motion For Rehearing, New Trial or Review of Claimants and Intervenor Joseph P. Boyle and Ed Haft and on objections to said motion. Messrs. R. Lewis Brown and Harlow Pease, Assistants to the Attorney of the United States in and for the District of Montana, were present in Court and represented the United States. Mr. Earle N. Genzberger was present in Court on behalf of said Claimants and Intervenor Joseph P. Boyle and Ed Haft.

Thereupon said motion was argued by Mr. Genz-

berger, whereupon at the conclusion of his argument, the Court ordered that the Motion For Rehearing, New Trial or Review of Claimants and Intervenor Joseph P. Boyle and Ed Haft will be denied. Thereupon Mr. Genzberger asked for an exception to the ruling of the Court, whereupon the Court ordered that an exception to this ruling be noted on the record.

Entered in open Court at Butte, Montana, April 22, 1944.

H. H. WALKER,
Clerk [104]

That on August 7, 1944 the Statement of Points To Be Relied Upon On Appeal of Intervenor and Claimants was filed herein in the words and figures following, to-wit:

[Title of the District Court and Cause.] [105]

STATEMENT OF POINTS TO BE RELIED
UPON ON APPEAL

The following is a concise statement of the points upon which the Claimants and Intervenor in the above-entitled cause, Joseph P. Boyle and Ed Haft, intend to rely on its appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the Judgment and Decree entered hereon on December 23, 1943 by the United States District Court of the District of Montana, Butte Division:

1. The Court erred in denying the Motion of

Claimants and Intervenor, herein, for a continuance of trial of said cause.

2. The Court erred in denying the request of said Claimants and Intervenor for production of offending liquor in Court for use on cross-examination of the witness, J. H. Cosgriff.

3. The Court erred in denying the formal motion of Claimants and Intervenor to compel the Government to produce offending liquor in Court.

4. Denial of the Motion of Claimants and Intervenor to dismiss said cause made at the close of the Government's case.

5. Abuse of discretion in denying Claimants and Intervenor's Motion for recess to permit the attendance of the witness Ed Haft who was a necessary witness on behalf of said Claimants and Intervenor to prove the case of said Claimants and Intervenor from 3:00 P. M. to 4:30 P. M. on Tuesday, December 21, 1943.

6. Abuse of discretion in denying Claimants and Intervenor a recess from 3:00 P. M. on December 21, to 10:00 A. M. [106] on December 22nd, 1943 in order to enable Ed Haft, principal witness of Claimants and Intervenor to be present and to testify.

7. The Court erred in refusing to permit the witness C. D. McGarry to complete his testimony and in ordering the attorney for Claimants and Intervenor to call his next witness.

8. The Court erred in denying and overruling the Motion of Claimants and Intervenor to dismiss

the proceedings, made at the close of all the evidence on all the grounds stated in said motion.

9. There was introduced in this case no evidence sufficient to support the facts as found by the Court or the conclusions of law based thereon.

10. The Court erred in entering a Judgment of Forfeiture and entering a Decree against Claimants and Intervenor, herein.

11. The Court erred in overruling and denying Claimants and Intervenor's Motion for Rehearing, New Trial or Review on all the grounds stated in said motion.

Dated this 7th day of August, 1944.

EARLE N. GENZBERGER

Attorney for Claimants and
Intervenor

Service of the foregoing Statement of Points to be relied upon on Appeal, acknowledged, and copy thereof received this 7th day of August, 1944.

JOHN B. TANSIL

United States Attorney
R. LEWIS BROWN

Asst. United States Attorney

[Endorsed]: Filed August 7, 1944, H. H. Walker.
Clerk. [107]

That on July 20, 1944 the Intervenor and Claimants filed their Notice of Appeal herein in the words and figures following, to-wit:

[Title of the District Court and Cause.] [108]

NOTICE OF APPEAL

To: The United States of America, Libelant above named, and to Honorable John B. Tansil, U. S. Attorney for the District of Montana, and to Honorable R. Louis Brown, Assistant U. S. Attorney for the District of Montana, Attorneys for Defendants.

You and each of you are hereby notified and will please take notice that Edward Haft and Joseph P. Boyle, Claimants and Intervenor in the above entitled cause, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit, San Francisco, California, from the final Judgment and Decree given, made, rendered and entered in the above entitled cause by the above entitled court on the 23rd day of December, 1943.

Dated this 20th day of July, 1944.

EARLE N. GENZBERGER

Attorney for Claimants and
Intervenor.

[Endorsed]: Filed July 20, 1944, H. H. Walker,
Clerk. [109]

That on August 4, 1944 the Bond for Cost on Appeal was filed herein in the words and figures following, to-wit:

[Title of the District Court and Cause.] [110]

BOND FOR COST ON APPEAL

Know All Men By These Presents:

That Edward Haft and Joseph P. Boyle, both of Butte, Montana, as principals, and Rudy E. Endresse and Helena P. Walsh, both of Butte, Montana, as sureties, hereby acknowledge themselves jointly and severally firmly bound to the above named Libelant, the United States of America, in the sum of Two hundred and fifty and no/100 (\$250.00) Dollars, lawful money of the United States, for the payment of which, well and truly to be made, we, and each of us respectively, bind ourselves, our and each of our executors, administrators, and heirs, jointly and severally, as aforesaid, firmly by these presents.

Sealed with our seals and dated this 4th day of August, 1944.

The conditions of the above obligation is such that whereas, the Claimants and Intervenor herein are appealing to the United States Circuit Court of Appeals for the 9th Circuit from that Final Judgment and Decree of the above entitled District Court, filed and entered in the above entitled cause on the 23rd day of December, 1943 and from the Order of said District Court entered on the 22nd day of April, 1944 denying and overruling the Motion of Claimants and Intervenor, Joseph

P. Boyle and Edward Haft for Rehearing, New Trial or Review.

Now, Therefore, if the said Claimants and Intervenors [111] shall pay the costs of Appeal; if the Appeal be dismissed or said Judgment and Decree and Order, or either of them be affirmed; or such costs, as such Appellate Court may award if such Judgment and Decree and Order, or either of them, is modified, then this obligation shall be null and void, otherwise to be and remain in full force and effect.

In witness whereof, we have hereunto set our hands and seals this 4th day of August, 1944.

EDWARD HAFT

JOSEPH P. BOYLE

RUDY E. ENDRESSE

HELENA P. WALSH

State of Montana,

County of Silver Bow—ss.

Rudy E. Endresse and Helena P. Walsh, the sureties mentioned in the foregoing Bond, being first duly sworn, each for himself, says: I am a resident and freeholder and householder within the County of Silver Bow, State of Montana, and worth double the amount of the within bond over and above all my just debts and liabilities and not including property exempt from execution.

RUDY E. ENDRESSE

HELENA P. WALSH

Subscribed and sworn to before me this 4th day of August, 1944.

[Notarial Seal] JOHN J. WALSH

Notary Public for the State of Montana, residing at Butte, Montana.

My commission expires Feb. 26, 1946.

[Endorsed]: Filed August 4, 1944, H. H. Walker, Clerk. [112]

That on August 5, 1944 the Order for Bond on Appeal was filed herein in the words and figures following, to-wit:

[Title of the District Court and Cause.] [113]

ORDER FOR BOND ON APPEAL

It appearing to the Court herein that the above named Joseph P. Boyle and Ed Haft, as Claimants and Intervenor herein, have appealed to the Circuit Court of Appeals from the Judgment of Forfeiture heretofore duly given and made on December 23, 1943, and on Motion of Earle N. Genzberger, Attorney for Claimants and Intervenor herein, for a stay of proceedings, pending appeal and this appearing to be a proper cause therefor,

It Is Ordered, and this does order, that upon the filing by the Claimants and Intervenor of a bond in the penal sum of Five hundred and no/100 (\$500.00) Dollars within five days from the date hereof, with sureties, to be approved by this Court,

conditioned for the satisfaction of the Judgment of this Court and of the Appellate Court, together with costs, interest and damages for delay, if for any reason the appeal is dismissed, or if the Judgment is affirmed, and to satisfy in full such modification of the Judgment or such costs, interest and damages as the Appellate Court may adjudge or award, that the operation of the Judgment of December 23, 1943, be suspended and that the property described in said Judgment herein shall remain in the custody of the United States Marshal for the District of Montana, subject to the further order of this Court or of the Appellate Court, during the pendency of the appeal to the Circuit Court of Appeals [114] for the Ninth Circuit and until the determination of said appeal by said Court and for thirty (30) days thereafter.

Dated this 5th day of August, 1944.

JAMES H. BALDWIN

Judge.

[Endorsed]: Filed August 5, 1944, H. H. Walker, Clerk. [115]

That on August 5, 1944 the Bond for Stay of Proceedings on Appeal was filed herein in the words and figures following, to-wit:

[Title of the District Court and Cause.] [116]

BOND FOR STAY OF PROCEEDINGS
ON APPEAL

Know All Men By These Presents:

That Edward Haft and Joseph P. Boyle, both of Butte, Montana, as principals, and Rudy E. Endresse and Helena P. Walsh, both of Butte, Montana, as sureties, hereby acknowledged themselves jointly and severally firmly bound to the above named Libelant, the United States of America, in the sum of Five hundred and no/100 (\$500.00) Dollars, lawful money of the United States, for the payment of which, well and truly to be made, we, and each of us respectively, bind ourselves, our and each of our executors, administrators and heirs, jointly and severally, as aforesaid, firmly by these presents.

Sealed with our seals and dated this 4th day of August, 1944.

The conditions of the above obligation is such that whereas, the Claimants and Intervenor herein are appealing to the United States Circuit Court of Appeals for the 9th Circuit from that Final Judgment and Decree of the above entitled District Court, filed and entered in the above entitled cause on the 23rd day of December, 1943 and from the Order of said District Court entered on the 22nd

day of April, 1944 denying and overruling the Motion of Claimants and Intervenor, Joseph P. Boyle and Edward Haft for Rehearing, New Trial or Review and have requested a stay of Proceedings herein. [117]

The conditions of this obligation are such that if the said Joseph P. Boyle and Edward Haft, claimants and Intervenor herein shall prosecute the appeal to effect and shall satisfy the Judgment in full, together with costs, interest and damages for delay, if for any reason the appeal is dismissed, or if the Judgment is affirmed, or shall satisfy in full such modification of the Judgment and such costs, interest and damages as the said Circuit Court of Appeals may adjudge or award, then this obligation shall be void; otherwise to remain in full force and effect.

In Witness Whereof, we have hereunto set our hands and seals this 4th day of August, 1944.

EDWARD HAFT

JOSEPH P. BOYLE

RUDY E. ENDRESSE

HELENA P. WALSH

State of Montana

County of Silver Bow—ss.

Rudy E. Endresse and Helena P. Walsh, the sureties mentioned in the foregoing Bond, being first duly sworn, each for himself, says: I am a resident and freeholder and householder within the County of Silver Bow, State of Montana and worth

double the amount of the within bond over and above all my just debts and liabilities and not including property exempt from execution.

RUDY E. ENDRESSE

HELENA P. WALSH

Subscribed and sworn to before me this 4th day of August, 1944.

[Notarial Seal] JOHN J. WALSH

Notary Public for the State of Montana, residing at Butte, Montana. My Commission expires Feb. 26, 1946.

Approved this 5th day of August, 1944.

JAMES H. BALDWIN

Judge

[Endorsed]: Filed August 5, 1944. H. H. Walker, Clerk. [118]

That on August 7, 1944 the Intervenors and claimants filed herein their Designation of Contents of Record on Appeal in the words and figures following, to-wit:

[Title of the District Court and Cause.] [119]

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL

To: Honorable Harry H. Walker, Clerk of the Above Entitled Court.

Comes now the Claimants and Intervenors, Joseph P. Boyle and Edward Haft in the above en-

titled cause and hereby designates to be contained in the Record on Appeal, the following papers, to-wit:

1. Libel of Information for Condemnation.
2. Notice of Seizure.
3. Claim and Intervention of Owners and Answer to Libel of Edward Haft and Joseph P. Boyle.
4. Warrant of Arrest and Monition with Marshal's Return.
5. Reply.
6. Clerk's Minutes Entry, dated August 27, 1943.
7. Order Setting Case for Trial at Butte on Dec. 21, 1943.
8. Motion to Compel Production of Liquor in Court.
9. Clerk's Minutes Entry dated December 21, 1943.
10. Plaintiff's Exhibit No. 1
11. Plaintiff's Exhibit No. 2.
12. Defendant's Exhibit No. 3.
13. Narrative Statement of Evidence.
14. Motion to Dismiss.
15. Clerk's Minutes Entry dated December 23, 1943.
16. Findings of Fact and Conclusions of Law.
17. Decree of Condemnation and Foreiture, and for Costs.
18. Notice of Entry of Judgment.
19. Motion for Rehearing, New Trial or Review of Claimants and Intervenors, Joseph P. Boyle and Ed Haft.
20. Affidavit of Earle N. Genzberger.

21. Affidavit of C. D. McGarry.
22. Affidavit of Joseph P. Boyle.
23. Affidavit of Ed Haft.
24. Objections to New Motion for Rehearing,
New Trial of Review.
25. Affidavit of R. Lewis Brown.
26. Clerk's Minutes Entry dated April 14, 1944
and Order contained therein.
27. Order Denying Motion for Rehearing, New
Trial or Review, dated April 22, 1944.
28. Statement of Points to be relied upon on Ap-
peal. [120]
29. Notice of Appeal.
30. Bond for Cost on Appeal.
31. Order for Bond on Appeal.
32. Bond for Stay of Proceedings on Appeal.
33. This Designation of Record.
34. Clerk's Certificate.

Dated this 7th day of August, 1944.

EARLE N. GENZBERGER

Attorney for Claimants and
Intervenors

Service of the foregoing Designation of Contents
of Record acknowledged, and copy thereof received
this 7th day of August, 1944.

JOHN B. TANSIL

United States Attorney

R. LEWIS BROWN

Asst. United States Attorney

[Endorsed]: Filed August 7, 1944. H. H.
Walker, Clerk. [121]

In the District Court of the United States
District of Montana
Butte Division

No. 110

UNITED STATES OF AMERICA,

Libelant,

vs.

406 Bottles of Distilled Liquor,

Libelees,

JOS. P. BOYLE and ED HAFT,

Claimants and Intervenors.

ORDER

Upon application of the Claimants and Intervenors herein, Joseph P. Boyle and Edward Haft, and for good cause shown and being fully advised in the premises.

It is Ordered , and This Does Order, that the time for filing the Record on Appeal herein and docketing this action in the Circuit Court of Appeals for the Ninth Circuit is extended to and including the 20th day of September, 1944.

Dated this 26 day of August, 1944.

JAMES H. BALDWIN

Judge

Attest, a True Copy:

[Seal] H. H. WALKER,
 Clerk.

By HAROLD L. ALLEN
 Deputy.

[Endorsed]: Filed & Entered August 26, 1944.
H. H. Walker, Clerk. [122]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO TRANSCRIPT
OF RECORD ON APPEAL

United States of America,
District of Montana—ss.

I, H. H. Walker, Clerk of the District Court of the United States for the District of Montana, do hereby certify to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of 122 pages, numbered consecutively from 1 to 122, inclusive, is a full, true and correct transcript of all matter designated by the parties and required by rule as the record on appeal in case No. 110, United States of America, Libellant, v. 406 Bottles of Distilled Liquor, Libellees, Joseph P. Boyle and Edward Haft, Claimants and Intervenor, excepting the so-called Narrative Statement of the Evidence designated by said Claimants and Intervenor which was by the order of said District Court made and entered on August 28, 1944, ordered stricken from the record of said

District Court as an encumbrance thereon and deemed by said order to be not proper for inclusion as a part of the record in this transcript of record on appeal, as appears from the original records and files of said District Court in my custody as such Clerk.

I further certify that the costs of said transcript amount to the sum of Twenty-three and 80/100 Dollars (\$23.80) and have been paid by the appellants.

Witness my hand and the seal of said District Court at Butte, Montana, this 16th day of September, 1944.

[Seal]

H. H. WALKER,
Clerk.

HAROLD L. ALLEN

By Harold L. Allen

Deputy Clerk. [123]

[Endorsed]: No. 10874. United States Circuit Court of Appeals for the Ninth Circuit. Joseph P. Boyle and Edward Haft, Appellants, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Montana.

Filed September 18, 1944.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of
Appeals for the Ninth Circuit

No. 10874

JOSEPH P. BOYLE and EDWARD HAFT,
Appellants,
vs.

UNITED STATES OF AMERICA, Libelant,
Appellee.
406 Bottles of Distilled Liquor,
Libelee.

STATEMENT OF POINTS TO BE RELIED
UPON BY APPELLANTS IN THE CIR-
CUIT COURT OF APPEALS AND DESIG-
NATION OF PORTIONS OF THE RECORD
TO BE PRINTED

Comes now the Appellants herein, Joseph P. Boyle and Edward Haft, and designates as the points to be relied upon on its appeal to the Circuit Court of Appeals and the portions of the Record necessary to be printed for consideration of the same, the following:

1. Appellants adopt and will rely upon in the Circuit Court of Appeals, the Statement of Points to be Relied upon on Appeal, filed in the District Court.
2. The Appellants designate the entire record, as certified by the Clerk of the District Court, to the Circuit Court of Appeals as necessary to be printed for the consideration of the Appeal.

Dated at Butte, Montana, this 22nd day of September, 1944.

EARLE N. GENZBERGER

Attorney for Appellants.

Service of the foregoing Statement of Points to be Relied upon by Appellants in the Circuit Court of Appeals and Designation of portions of the record to be printed, acknowledged and copy thereof received this 22nd day of September, 1944.

JOHN B. TANSIL

United States Attorney

R. LEWIS BROWN

Asst. United States Attorney

[Endorsed]: Filed Sept. 25, 1944. Paul P. O'Brien, Clerk.

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

JOSEPH P. BOYLE and EDWARD
HAFT,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT
OF THE UNITED STATES FOR THE
DISTRICT OF MONTANA

BRIEF OF APPELLANTS

Earle N. Genzberger,
203-4 Lewisohn Bldg.,
Butte, Montana,
Attorney for Appellants.

FILED

DEC - 5 1944

PAUL P. O'BRIEN,

CLERK



No. 10874

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

JOSEPH P. BOYLE and EDWARD
HAFT,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT
OF THE UNITED STATES FOR THE
DISTRICT OF MONTANA

BRIEF OF APPELLANTS

Earle N. Genzberger,
203-4 Lewisohn Bldg.,
Butte, Montana,
Attorney for Appellants.

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IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

No. 10874

JOSEPH P. BOYLE and EDWARD
HAFT,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT
OF THE UNITED STATES FOR THE
DISTRICT OF MONTANA

BRIEF OF APPELLANTS

STATEMENT OF FACTS AND PLEADINGS

This is an action for a forfeiture of 406 bottles of distilled spirits, for an alleged failure to pay a \$2.00 per gallon floor tax under the provisions of sub-division (j) of Section 2800, Title 26, U. S. Code, due and payable November 1, 1942. The seizure was made April 20, 1943 by U. S. Internal Revenue Agents under Section 3720, Title 26, U. S. Code (R. 4).

A Libel of Information for condemnation was filed May 25th, 1943 alleging jurisdiction under Section 3723 (a) Title 26, U. S. Code (R. 2), and a warrant of arrest and monition (R. 21-24) was issued and a Notice of Seizure duly published (R. 7-11), and on June 2, 1943, Joseph P. Boyle and Edward Haft, the appellants herein, filed their "Claim and Intervention of Owners and Answer to Libel." (R. 11-19.)

The Libel of Information (R. 2-4) alleged the seizure by Internal Revenue officers of 406 bottles of distilled liquor, consisting of whiskey, brandy, rum and gin, containing 60.9 proof gallons of alcohol from the Atlas Bar at 137 East Park Street, Butte, Montana, which was occupied as a saloon, where such liquors were held, intended for sale, and sold for beverage purposes and alleged that the said liquors were kept and maintained for the purpose of being sold in fraud of the Internal Revenue laws and with design to avoid payment of the taxes levied thereon, i. e., the aforesaid floor tax.

The answer of the Claimants alleged that they were duly licensed retail liquor dealers, licensed by the United States to sell intoxicating liquor at retail. They admitted the jurisdiction of the Court and the levy of the floor tax and that the liquors were in their place of business for purposes of sale and admitted that the Government seized the 406 bottles on the 20th day of April but "deny that any of the liquors seized by the agents of the United States Government * * * was subject to any unpaid internal revenue taxes of any kind, character or description and allege the fact to be *that all taxes*

had been paid on each and every one of the 406 bottles of distilled liquors named as libelce herein.” (R. 12, para. V); and as an affirmative defense in propounding their claim of ownership, the claimants and intervenors alleged their ownership and operation of the Atlas Bar; that they were retail liquor dealers duly licensed by the United States to engage in such business and to sell intoxicating liquor at retail and that the seizure was done by the agent in charge of the alcoholic tax unit, acting under the direction and jurisdiction of the Collector of Internal Revenue, purporting to act under Section 3720 of Title 26, U. S. Code “without search warrant, or warrant of any kind, and without authority of law, did take from the possession of these intervenors 406 bottles of distilled liquor containing 60.9 proof gallons of alcohol,” and describing the liquor, (R. 14-16); that the claimants were the owners and in possession of those liquors and were duly authorized by the United States Government to sell such liquors at retail, (R. 17) and that:

“All Federal taxes on each and every one of said bottles of intoxicating liquors, or distilled spirits, had been paid in full long prior to April 20, 1943, the date of seizure; and that none of said liquor, at the time of seizure, on April 20, 1943, or at 137 East Park Street, was contraband in the sense that no Federal tax had been paid thereon.” (Italics ours.)

“That these intervenors had paid the floor tax imposed by the Internal Revenue Act of 1942 on such of said liquors as was in the possession of these intervenors on November 1, 1943; and that all of such liquors were purchased by these intervenors from the Montana State Liquor Store, and at the times of said respective purchases said liquors, and

all thereof, had had the Federal tax paid thereon.

"That all of said bottles bear internal revenue stamps, showing the tax thereon to have been paid, with the exception of wines, if any, which show the tax receipts and tax stamps upon the original packages.

"That no just or legal cause existed on April 20, 1943, for the seizure or withholding from these intervenors of said property." (R. p. 17-18.)

It was further alleged in the Answer (R. 18) and admitted in the Reply (R. 25), that at the time and place of said seizure, the Government agents took and withheld all invoices, receipts for taxes paid and all bills, receipts and other evidences of purchase and tax transactions then in possession of the Intervenor. The Answer and the Claim of Intervenor was filed June 2, 1943 (R. 20) and the Reply of the Libelant was served and filed June 7, 1943.

An immediate effort was made by both the Government and the Intervenor to set the matter for hearing but because of the press of other business, the Court was unable to fix a date for hearing. A second motion for setting this case for trial was made on August 27th (R. 28). No setting having been made, counsel for the Intervenor and Claimants, the Agent in charge of the Alcoholic Tax Unit, and an assistant U. S. Attorney, Roy F. Allan, agreed to compromise all pending matters (R. 74-80). In settlement and compromise, the Internal Revenue Department requested, and the claimant paid \$446.26 (R. 76-77). This money was transmitted to the Attorney General (R. 78-79), and thereafter upon de-

mand of the Investigator in charge of the Alcoholic Tax Unit, the additional sum of \$395.76 to complete the compromise was paid (R. 79).

Two months after the compromise, and on December 13, 1943, the Court, of its own motion, set the case for trial for Tuesday, December 21, 1943 (R. 79).

Upon receipt of the copy of the Order setting the case for trial, counsel for intervenors immediately wrote to Mr. Roy F. Allan, Assistant United States Attorney at Billings stating that the case had been set for hearing and requested a continuance of the setting, in view of the settlement and compromise (R. 80). To this Mr. Allan replied that he had re-submitted the offer in compromise of both criminal and civil liability to the Attorney General with the recommendation that the offer in compromise be accepted and that he would advise counsel further (R. 80). Counsel for the intervenors, believing that the case would be vacated or dismissed did not notify Haft and Boyle, his clients, of the setting of the case for trial on December 21, 1943, and took no other steps preparatory for trial.

On the morning set for the trial, the Court denied the power of the government officials to compromise a case pending in his Court and refused a continuance and insisted on proceeding to trial over the objections and protests of counsel for intervenors and in the absence of both intervenors. Owing to the absence of Claimant Haft from the city, it was impossible for intervenors to show the facts surrounding the taking of the original inventory after midnight of October 31, 1942 (R. 88-92).

The United States Attorney called to the attention of the Court the fact that an offer in compromise had been made and was under consideration by the Attorney General (R. 31-32).

At 10:30 A. M. counsel for intervenors produced the correspondence with the Government officials and requested a continuance to the following Monday morning. That was likewise denied. During the cross examination of the Government Agent, Cosgriff, counsel for intervenors asked that the seized liquor be produced in Court (R. 33), which was denied, and the exception of the claimant and owners to the ruling of the Court was duly noted.

At the conclusion of the Government's case, counsel for claimants called to the attention of the Court the absence of Mr. Haft and asked to have the proof of claimants case continued until the following morning at 10:00 o'clock, (R. 35). This was likewise denied.

In the course of examination of witness McGarry, the accountant who made up the tax returns (Exhibits 1 and 2), his worksheet (Exhibit 4) and the original inventory (Exhibit 5), were exhibited to him, and after he stated that he did not know in whose handwriting Exhibit 5 was, the Judge directed the witness to leave the stand, (R. 34).

The exhibits were not received in evidence because no proper foundation could be laid under the circumstances, (R. 34).

Counsel thereupon stated that his next witness, Ed Haft, who took the inventory, would connect up the

testimony relative to Exhibit 5, and stated that Witness Haft was on his way from Missoula and moved that the Court recess until 4:30 o'clock, (it was then about 3:00 o'clock). This request was also denied.

The Court thereupon made its findings of fact and conclusions of law, forfeiting the 406 bottles of liquor and denied claimants and intervenors the right thereto, (R. 36-40). Formal findings of fact and conclusions of law were signed and filed December 23, 1943 and a Decree of Forfeiture in accordance therewith was signed and filed by the Court on the same date, (R. 65-68).

Thereafter and within 10 days, to-wit: on December 31, 1943, intervenors filed a motion for Rehearing, New Trial, or Review (R. 69-73), and therewith filed the affidavits of Earle N. Genzberger (R. 73-83), McGarry (R. 84-86), Boyle (R. 86-87) and Haft (R. 88-92), to which the Government, on January 4, 1944 filed objections (R. 92-94) with a counter-affidavit of R. Lewis Brown (R. 95-98). Thereafter and on April 14, 1944 (R. 99), the Court set the Motion for a Rehearing, New Trial or Review for hearing on April 22 (R. 99), and on April 22, 1944, after argument, the Court denied the Motion and granted an exception to the ruling (R. 100-101).

Within 90 days thereafter and on June 20, 1944, a Notice of Appeal was filed by the intervenors (R. 104) and the Appeal was thereafter perfected by giving bonds for costs and stay of proceedings, (R. 105-110).

In preparation of the Record of Appeal, counsel for intervenors prepared a Narrative Statement of the Evi-

dence under Rule 75 (c), there having been no official stenographer present at the trial and no transcript of the testimony available. Later this Narrative Statement was stricken from the Record by the District Court, and following that ruling, the Clerk of the Court below has refused to certify the Narrative Statement to this Court, (R. 115-116).

However, appellants are submitting this Appeal upon the pleadings and the minutes of the Court, the written exhibits and the affidavits and counter-affidavits filed in connection with the Motion for a New Trial. These, we believe, are sufficient to present the questions which appellants are urging as reversible error in this appeal.

Jurisdiction of Appellate Court

The Motion for New Trial was filed within eight days after Notice of Entry of Judgment (R. 69-73), and the Notice of Appeal was filed within ninety days of the denial by the Court below of that Motion (R. 69, 104), which gives to this Court jurisdiction of the Appeal.

See Fed. Rule 59;

O'Brien's Manual Fed. Appellate Procedure, p. 39, also 1943 Supp. p. 13, and cases cited.

Questions Presented

In this Court the appellants contend that in view of the original floor tax return and the payments of the taxes therein computed, a substantial sum, followed by the compromise proceedings and the payments by the ap-

pellants of the demands of the Government thereupon, prior to the setting of the case for trial that:

1. The Court below abused its discretion in:
 - (a) denying the Motion of the appellants for a continuance of the trial (R. 32),
 - (b) in refusing a recess to the following morning at 10:00 o'clock (R. 35, line 5), and
 - (c) in refusing a recess from 3:00 P. M. to 4:30 P. M. (R. 35) to enable intervenor Haft to appear as a witness in his own behalf, (R. 35).
2. The Court abused its discretion in denying intervenors' Motion for New Trial, based on the grounds of surprise, mistake, and excusable neglect which ordinary prudence would not have guarded against (R. 69-73, R. 100-101).
3. The Court erred in denying the oral and written Motion of Intervenors for the producing in Court of the liquors, which the Government's witness contended was not tax paid (R. 33, line 3 et seq., R. 34, line 8, R. 30).
4. Is a forfeiture permissible where the pleadings and proof merely shows an erroneous return?

Specification of Errors

1. The Court erred in denying the Motion of Claimants and Intervenors, herein, for continuance of trial of said cause. (R. 32.)
2. The Court erred in denying the request of said Claimants and Intervenors for production of offending liquor in Court for use on cross-examination of the witness, J. H. Cosgriff. (R. p. 33.)
3. The Court erred in denying the formal motion

of Claimants and Intervenors to compel the Government to produce offending liquor in Court. (R. p. 30 and p. 34.)

4. Denial of the Motion of Claimants and Intervenors to dismiss said cause made at the close of the Government's case. (R. p. 57 and p. 34.)
5. Abuse of discretion in denying Claimants and Intervenors' Motion for recess to permit the attendance of the witness Ed Haft who was a necessary witness on behalf of said Claimants and Intervenors to prove the case of said Claimants and Intervenors from 3:00 P. M. to 4:30 P. M. on Tuesday, December 21, 1943. (R. p. 34-35.)
6. Abuse of discretion in denying Claimants and Intervenors a recess from 3:00 P. M. on December 21, to 10:00 A. M. on December 22, 1943 in order to enable Ed Haft, principal witness of Claimants and Intervenors to be present and to testify. (R. p. 34-35.)
7. The Court erred in refusing to premit the witness, C. D. McGarry to complete his testimony and in ordering the attorney for Claimants and Intervenors to call his next witness. (R. p. 84.)
8. The Court erred in denying and overruling the Motion of Claimants and Intervenors to dismiss the proceedings, made at the close of all the evidence on all the grounds stated in said motion.
9. There was introduced in this case no evidence sufficient to support the facts as found by the Court of the conclusions of law based thereon.
10. The Court erred in entering a judgment of Forfeiture and entering a Decree against Claimants and Intervenors, herein.
11. The Court erred in overruling and denying Claimants and Intervenors' Motion for Rehearing, New Trial or Review on all grounds stated in said motion. (R. p. 69-73, p. 100.)

ARGUMENT

The Court erred in denying the Motion of Claimants and Intervenor, herein, for a continuance of trial of said cause. (R. 32.)

Abuse of discretion in denying Claimants and Intervenor's Motion for recess to permit the attendance of the witness Ed Haft who was a necessary witness on behalf of said Claimants and Intervenor from 3:00 P. M. to 4:30 P. M. on Tuesday, December 21, 1943. (R. 34-35.)

Abuse of discretion in denying Claimants and Intervenor a recess from 3:00 P. M. on December 21, to 10:00 A. M. on December 22, 1943 in order to enable Ed Haft, principal witness of Claimants and Intervenor to be present and to testify.

The Court erred in overruling and denying Claimants and Intervenor's Motion for Rehearing, New Trial or Review on all the grounds stated in said motion. (R. 69-73, 100.)

We believe it is most convenient to discuss the foregoing specifications of errors numbered 1, 5, 6 and 11 together.

The Court Below Abused Its Discretion

We enter into this argument with the rule in mind that granting or refusing of a Motion for Continuance and the granting or refusing of a Motion for New Trial is within the sound discretion of the trial court, but it is also elementary that the appellate court has jurisdiction

over such orders by a trial court where there is a manifest abuse of discretion.

“While the elementary rule is that the granting or refusing of a continuance is within the discretion of a trial court,—a discretion which will not be lightly interfered with,—it is equally elementary that where it is manifest that there has been plain abuse of discretion, the duty to correct arises.”

Guardian Assurance Company vs. Quintana, 227
U. S. 100, 57 L. Ed. 437, 33 S. C. 236.

This Court has held:

“The trial court is vested with discretion to grant and refuse continuances. This discretion should be exercised in such manner as to assure the parties a fair trial without undue delay. It is eminently proper that the trial of a cause should be deferred a reasonable time, to enable him to secure his evidence, and properly present his contentions.”

Bedgisoff vs. Cushman (C. C. A. 9th) 12 F. 2d
667.

In the case last cited, the Court held that where the action of the trial court is unwarranted, it is the duty of the Court of Appeals to interfere.

With reference to a Motion for a New Trial, the Supreme Court of Appeals for the 5th Circuit, says:

“It is a general rule in Federal Courts that the allowance or refusal of a new trial rests in the sound discretion of the trial court and error cannot be assigned thereto * * * However, there are exceptions to both rules.”

City of Amarillo vs. Emery (C. C. A. 5th) 69 F.
2d 626.

"The 'discretion' here intended is a judicial discretion governed by the situation and circumstances affecting the exercise thereof. Even where an appellate court has power to review the exercise of such discretion, the inquiry is confined to whether such situation and circumstances clearly show an abuse of discretion, that is, arbitrary action not justifiable in view of such situation and circumstances."

Hartford-Empire Co. vs. Obear-Nester Glass Co.
(C. C. A. 8th) 95 F. 2d 414, 417.

Taking up the facts of this case in the light of these and similar decisions, we find that six months after the original seizure, the claimants herein yielded to the opportunity of re-claiming their liquor, by complying with the terms of the Government's proposition outlined in the letter of D. E. Dineen, Investigator in charge of the Alcoholic Tax Unit (R. 76-77).

The compromise and settlement is also corroborated in the letter from the Assistant District Attorney (which also refers to the authorization of the Attorney General in Circular No. 3780), (R. pp. 78-79), and it is undisputed that later \$395.76 additional tax was paid.¹

It is fundamental that:

"Forfeitures are not favored; they should be enforced only when within both letter and spirit of the law.

United States vs. One Model 1936 Ford, 307 U. S. 211, 215, 83 L. Ed. 1249; 59 S. C. 861;

Farmers and Mechanics National Bank vs. Dearing, 91 U. S. 29, 23 L. Ed. 196.

¹—This included the original tax of \$228.51 for which claim for Refund was contemporaneously made.

It is also the law that:

“It is well settled that a failure due to honest mistake to file a required schedule does not involve penalties imposed for not making any return.”

U. S. vs. Tillinghast (C. C. A. 1st) 69 F. 2d 718.

It was entirely natural for counsel for the intervenors and claimants to consider, as he did, that his employment had been terminated through the payment by his clients of \$446.26 plus \$395.76, a total of \$842.02 (R. 78-79), in addition to the sum of \$228.51 paid November 30, 1942 (R. 41).

Under the circumstances, counsel for claimants and intervenors naturally neglected to secure the presence and services of the official court reporter on the morning this case was set for trial, believing that the United States Attorney would join in a request for a vacation of the setting. Indeed, the minutes of the Court show that the District Attorney did bring to the attention of the Court this compromise settlement:

“Thereupon Mr. Brown stated that he desired to call to the attention of the Court the fact that an offer in compromise has been made herein, and that it is now under consideration by the Attorney General.” (R. 31-32.)

And again:

“Thereupon Mr. Genzberger stated to the Court that an offer in compromise has been made in this case and that he did not think that this case would be tried until the offer had been disposed of, and now moved the Court to continue the trial of this case until next Monday morning at ten o'clock (R. p. 31, lines 13 et seq.).

Later in the trial, the minutes of the Court show that:

“Thereupon Mr. Genzberger asked that the letter of Assistant U. S. Attorney Allan, dated December 16, 1943, be placed in the Record, to which the Government objected.” (R. 36, lines 11-14.)

Unfortunately, no record has been kept of the comments of the trial judge, which would have filled many pages of the record. We believe, however, that it will not be contradicted that he denied the power of Internal Revenue officials and the United States Attorney to settle or compromise a case of this character in his Court without his permission.

This power exists by express statutory provision (*See Section 3761, Title 26, U. S. C. A.*).

The Circuit Court of Appeals of the Fifth Circuit said relative to proceedings under that Section:

“If the defendant, in good faith made the payment of the tax and penalty for the purpose of compromising the impending criminal action, he is entitled to the full effect and benefit of it regardless of whether or not he followed any technical rules of procedure laid down by the Internal Revenue Department. And, if his offer of compromise was accepted, no criminal proceeding could thereafter be had for his failure to pay the tax before commencing business. There could be no doubt under the uncontradicted evidence in the record that he made the payment to prevent being prosecuted criminally, and the Deputy Collector certainly led him to believe it would have that effect. The Deputy Collector undoubtedly had the authority to at least transmit the offer of compromise, and when he turned over the payment to his superior it was his duty to disclose to him that it was an offer in compromise. It is to be presumed that he did so, and the fact that the

money was retained by the United States and the stamp issued to defendant would raise the presumption that the offer of compromise had been accepted."

Willingham vs. United States (C. C. A. 5th) 208 F. 137.

This was cited with approval in the later case of *Rau vs. U. S.* (C. C. A. 2d) 260 F. 131, where, in a like manner to the case here under consideration, the trial judge there held a compromise or an effort at compromise immaterial in a criminal proceeding, and in reversing that decision the Second Circuit Court of Appeals said:

"The Commissioner of Internal Revenue had the power and authority by virtue of the statute above referred to, and with the advice and consent of the Secretary of the Treasury, to compromise the criminal case as well as the civil case arising under the internal revenue laws. The compromise may have been made before the institution of the criminal proceedings or after. The provision relating to the necessary consent of the Attorney General evidently intends a compromise after the institution of a civil or criminal action. If the defendant, in good faith, made the payment of the tax and penalty for the purpose of compromising the impending action, he is entitled to full protection and the benefits derived therefrom. If the money was accepted with the promise of immunity from further punishment in a criminal proceeding, it would be a complete defense to this indictment.

Willingham vs. United States, 208 Fed. 137, 127 C. C. A. 263.

"The acceptance, not only of the tax, but of the penalty, coupled with the statement of the internal revenue officer, that payment would end the matter, and that there would be no indictment, if true, would

be a good defense. The fact that the money was retained by the United States is some evidence of its acceptance in compromise. * * * * As was said in *United States vs. Chouteau*, 102 U. S. 603, 26 L. Ed. 246:

"He has been punished in the amount paid upon the settlement for the offense with which he was charged, and that should end the present action, according to the principle on which a former acquittal or conviction may be invoked to protect against a second punishment for the same offense."

RAU vs. U. S. (C. C. A. 2d) 260 Fed. 131, 133.

The denial of this power to compromise created by Section 3761 of Title 26, U. S. Code, has occasioned the entire miscarriage of Justice which has occurred in this case.

The Circuit Court of Appeals of the Fourth Circuit in *Oliver vs. U. S. (C. C. A. 4th) 267 Fed. 544*, after quoting the then Section 3229, now Section 3761, says:

"Under this statute a compromise once effected, whether before or after prosecution, is as complete a discharge of the defendant as a verdict of acquittal by a jury." (Page 548.) And again:

"It is of the highest importance that citizens, who deal with an officer of the government charged with an official duty, shall have the right to presume every instance, in the absence of positive proof to the contrary, that such officer did his duty." (Page 548.)

"It has been held that where a compromise was once made that the taxpayer could not later repudiate the compromise and sue to recover the money."

Schneider vs. U. S. (C. C. A. 6th) 119 Fed. 2d 215;
Aviation Corp. vs. U. S. (Ct. Cl.) 46 Fed. Supp.
491.

Certainly, if this were a suit between private individuals where money had been paid by the defendant to a plaintiff, it would be held unconscionable for the plaintiff to retain the money and then insist on proceeding with the lawsuit in the absence of the defendant and the defendant's witnesses.

The Courts of Montana have uniformly granted relief to a litigant injured through a failure of opposing attorneys to obey an agreement or stipulation. (See *Bullard vs. Zimmerman*, 82 Mont. 434, 268 Pac. 512.)

Likewise the Supreme Court of Oregon in *Voorhees vs. Geiser-Hendryx Inv. Company (Ore.)*, 98 Pac. 324, 326, in discussing the power of the Court to relieve a party from a judgment order or other proceeding taken against him through his mistake, inadvertable surprise, and excusable neglect said:

"An application under this Section is addressed to the discretion of the trial court; it, however, is not arbitrary, but should be exercised in conformity with the spirit of the law and in a manner to advance substantial justice. An erroneous exercise thereof is reviewable by this Court * * * * A Judgment taken against a party contrary to an understanding or agreement with his adversary is one taken by surprise within the meaning of the statute."

Voorhees vs. Geiser-Hendryx Inv. Company
(Ore.) 98 Pac. 324, 326
cf. 1 Black on Judgments, p. 336.

Supplementing Federal Rule 59 relative to new trial, there was in effect in the United States Court for the District of Montana, Rule 74, providing:

“New Trials.

A new trial may be granted in an action at law whether it was tried with a jury or without one, for any of the following causes materially affecting the substantial rights of the losing party:

- (1) Irregularity in the proceedings of the Court, jury or adverse party, or any order of the Court or abuse of discretion by which the losing party was prevented from having a fair trial;

* * * * *

- (3) Accident or surprise which ordinary prudence could not have guarded against.”

This Rule followed Section 9397 of the Revised Codes of Montana 1935 which was taken from Section 657 of the California Code of Civil Procedure and which adopts the same language as Section 9187 of the Revised Codes of Montana, taken from California Code of Civil Procedure, Section 473, which empowers a Court “to relieve a party or his legal representative from a Judgment, Order or other proceedings taken against him through his mistake, inadvertence, surprise or excusable neglect.”

Under these Sections, the Supreme Court of Montana has held that:

“This section was enacted for the very purpose of giving to the courts the power to relieve parties from judgments obtained against them by reason of mistake, inadvertence or excusable neglect, and in interpreting it courts should, in furtherance of justice, maintain the same liberal spirit which prompted its enactment. The rule is concisely stated by this court in *Nash vs. Treat*, 45 Mont. 250, Ann. Cas.

1913E. 751, 122 Pac. 745: 'Each case must be determined upon its own facts; and, when the motion is made promptly and is supported by a showing which leaves the court in doubt, or upon which reasonable minds might reach different conclusions, the doubt should be resolved in favor of the motion.' No great abuse of discretion by the trial court in refusing to set aside a default need be shown to warrant a reversal, for the courts universally favor a trial on the merits."

Brothers vs. Brothers, 71 Mont. 378, 383, 230 Pac. 60.

Reliance upon an oral agreement with adverse party, instead of written stipulation with his attorney, was held sufficient to show excusable neglect in *Koehler vs. D. Ferrari & Co.*, (Cal.), 156 Pac. 69.

Likewise the rule is stated in the case of *Miller vs. Lee*, (Cal. App.) 125 Pac. 2d 627, 629:

"The power, vested in trial courts by Section 473 of the Code of Civil Procedure should be freely and liberally exercised to the end that the cases shall be disposed of according to their substantial merits rather than upon mere technical matters of procedure."

In that same case last cited, it was held that:

"The 'surprise' mentioned in Section 473 of the Code of Civil Procedure, from the effect of which it is within the power of the courts upon satisfactory showing to relieve a party, is sometimes defined to be some condition or situation in which a party to a cause is unexpectedly placed to his injury, without any default or negligence of his own, which ordinary prudence could not have guarded against."

Miller vs. Lee, (Cal. App.) 125 Pac. 2d 726, 631.

Violation of an agreement to extend time to answer was also held with the term "excusable neglect, mistake, inadvertence or surprise" as defined in *Thompson vs. Connell et al*, (Ore.) 48 Pac. 467, 468.

We, therefore, submit to the Court that in view of all the circumstances, namely the fact that the intervenors and claimants did make a floor tax return showing some 112 proof gallons of distilled spirits, malt liquors and wines (R. 42-46), upon which they paid a substantial tax amounting to \$228.51 (R. 41); that almost six months thereafter, a seizure was made of the entire stock in trade of these claimants upon the allegation that "certain distilled spirits in bottles, on which the above named tax was imposed and upon which the said tax had not been paid" (R. p. 4, line 8, et seq.); that thereafter, following negotiations with the proper Governmental officials, an offer in compromise was made and \$446.26 paid (R. 76-77) and recommended by the District Attorney, pursuant to Attorney General circular No. 3780 (R. 78-79) and as part of the compromise, an additional tax of \$395.76 was paid (R. 79) twenty-seven days prior to the date that the case was set for trial (R. 35); that counsel for intervenors was thereafter justified in assuming that the case would not be tried and that his neglect in failing to secure the services of a court reporter and to notify his clients and their witnesses to be present on the date of the trial was certainly *excusable* under the circumstances.

We call to the attention of this Court the fact that there was no jury in attendance in the District Court and

that this is not a case where the trial court had a congested calendar with numerous cases ready for trial with many litigants and attorneys waiting around. This was the only matter set for hearing on December 21, or until a much later date. There was no case set for trial in the United States Court for the District of Montana which would have prevented the District Judge from having set this matter for hearing on the following Monday, December 27, 1943, assuming that a trial was necessary.

There was nothing else set for hearing on December 22, 1943 which would have prevented the District Court from having recessed the case until 10:00 o'clock on that morning to permit Haft to return from Missoula and give testimony in the case. The record fails to show, and in truth, there was nothing on the Court calendar which would have prevented the Court from accommodating counsel and litigants so as to have permitted these claimants to have presented all their evidence and to have had their day in Court and show that their inventory was honestly taken and prove to the Court that there was no fraud on their part and no intent to evade the payment of taxes to the United States and to prove their allegations to the effect that all taxes were paid upon the seized liquor at the time of the seizure on April 20, 1943, almost six months following the date that the tax was due and five months after the record shows the floor tax was paid.

The action of the Court in forcing intervenors to trial during their absence, in refusing any recess during the progress of the trial in order to permit intervenor Haft

to appear as a witness in his own behalf, coming as he did a distance of one hundred twenty-four miles in order to be present at the trial was an abuse of discretion on the part of the Court below and arbitrary exercise of power on the part of the District Court from which, in the exercise of its appellate jurisdiction, this Court should intervene and grant these appellants relief from the forfeiture of their property.

II.

The Court erred in denying the request of said Claimants and Intervenor for production of offending liquor in Court for use on cross-examination of the witness, J. H. Cosgriff. (R. 33.)

The Court erred in denying the formal motion of Claimants and Intervenor to compel the Government to produce offending liquor in Court. (R. 30, 34.)

The minutes of the Court disclose that during the testimony of John H. Cosgriff, a witness for the United States, that the following proceedings were had:

“Thereupon Mr. Genzberger asked that the seized liquor herein be produced in Court and admitted in evidence for examination by the Court, to which request the government objected. Thereupon Court ordered that the request be denied, and the exception of the claimants and owners to the ruling of the Court was duly noted.” (R. 33, lines 3-9.)

Following the conclusion of the Government's case in chief and preparatory to presenting the case of intervenors and owners, the minutes of the Court show that:

“Thereupon the claimants and owners filed and presented to the Court a motion to compel production in Court the 13 pints and 1 quart of Cavalier Gin, described in Exhibit 3, and certain liquor store sales slips, invoices, etc., mentioned in the motion, to which the government objected as not timely made. Thereupon Court ordered that the motion be and is denied, to which ruling of the Court the claimants and owners excepted and exception duly noted.” (R. 34.)

The Motion referred to is found on page 30, and omitting formal parts read as follows:

“Come now the intervenors and claimants, Joseph P. Boyle and Ed Haft, and move the above-entitled court for an order compelling the libelant to produce in Court the thirteen pints of Cavalier Gin and one quart of Cavalier Gin described in Exhibit “3” introduced as evidence in this case, and also to produce in Court and at the hearing of this action the liquor store sales slips, invoices, receipts for taxes paid, and all bills and other receipts, and other evidences of purchases and tax transactions, seized by the officers of the libelant from these claimants and intervenors on April 20th, 1943 at 137 East Park St., Butte, Montana, as alleged in Paragraph IX of the first affirmative defense of the intervenors herein and admitted in Paragraph I of the Reply herein.

Earle N. Genzberger,
Attorney for Intervenor and
Claimants.

(Served on District Attorney and Filed Dec. 21, 1943.)

It will be observed that this tax was levied under the provisions of Section 2800 (j) enacted October 21, 1942, 56 Stat., 970. This act reads:

“Upon all distilled spirits upon which the internal-revenue tax imposed by law has been paid, and which on the effective date of Title VI of the Revenue Act of 1942, are held and intended for sale or for use in the manufacture or production of any article intended for sale, there shall be levied, assessed, collected, and paid a floor stocks tax of \$2 on each proof-gallon, and a proportionate tax at a like rate on all fractional parts of such proof-gallon.”

Section 3 of paragraph (j) provides:

“All provisions of law, including penalties, applicable in respect of internal revenue taxes on distilled spirits shall, insofar as applicable and not inconsistent with this subsection, be applicable in respect of the floor stocks tax imposed hereunder.
* * * * .”

Section 2802 of Title 26 provides for the issuance and use of stamps on distilled spirits.

The following Section, 2803, Title 26 provides:

“No person shall transport, possess, buy, sell, or transfer any distilled spirits, unless the immediate container thereof has affixed thereto a stamp denoting the quantity of distilled spirits contained therein and *evidencing payment of all internal-revenue taxes imposed on such spirits.*” (Emphasis ours.)

Subsection (f) provides:

“All distilled spirits found in any container required to bear a stamp by this section, which container is not stamped in compliance with this section and regulations issued thereunder shall be forfeited to the United States.”

Under the pleadings in this proceeding, the issue was whether or not the liquors seized on April 20, 1943 were

"*contraband*" in the sense that the taxes were not paid thereon. The intervenors claim that each and all of the bottles of liquor were tax paid. In accordance with that theory and feeling that the liquors themselves were the best evidence, counsel for the intervenors, on cross-examination of Government agent Cosgriff, requested that the seized liquor be produced in Court (R. 33). This request the Court denied and an exception of the claimants was duly noted (R. 33).

While *Section 2806, Title 26*, which is part of the chapter relative to taxes on distilled spirits provides for penalties and forfeitures, *Section 3720 of Title 26*, under which these proceedings were had, provides:

"All goods, wares, merchandise, articles, or objects, on which taxes are imposed *which shall be found in the possession*, or custody, or within the control of any person, for the purpose of being sold or removed by him in fraud of the internal revenue laws, or *with design to avoid payment of said taxes*, may be seized, and shall be forfeited to the United States.

(2) * * *

(3) Equipment.

All tools, implements, instruments, and personal property whatsoever, in the place or building, or within any yard or inclosure where such articles or raw materials are found, may also be seized, and shall be forfeited as aforesaid. * * *

It will be noted that the foregoing statute is in the present tense, to-wit: "*Shall be found in the possession*" and "*Are found.*" The question directly raised then in these proceedings was whether or not on April 20, 1943,

the day of seizure, the liquors seized, or part thereof, were not tax paid in fraud of the revenue.

“Intent to defraud the United States of a tax is essential element and must be alleged and proved.”

Hawley vs. United States, (C. C. A. 8th), 15 Fed. (2d) 621.

Two elements were necessary, first, that the tax was not paid, and second that there was a fraudulent intent on the part of the owners and claimants to defraud the Government.

It stands admitted that a return was made by the claimants (R. 41-46), in which 112.28872 proof gallons of distilled spirits were returned, and a floor tax was paid of two dollars per gallon amounting to \$224.58 was paid (R. 41).

It appears from the affidavit of Haft that the printed instructions from the Internal Revenue Department do not provide for the listing of brands of liquor on hand (R. 90). This also appears from the affidavit of McGarry (R. top p. 85).

It was the contention of the Government that the inventory of seized liquor (R. 55) contained the entries of “13 pints of Cavalier Gin and 1 quart of Cavalier Gin” which did not appear on Plaintiff’s “Exhibit 1” (R. 44-45).

Intervenors’ contention was that the brand “Old Mr. Boston Gin” which occurred twice on page 45 was an error on the part of the accountant in making up the return and that one of the entries should have been

“Cavalier” Gin instead of “Old Mr. Boston.” (See Haft Affidavit, R. 90, McGarry Affidavit, R. 85.)

It was the contention of the intervenors that the bottles themselves would have disclosed stamps or other evidences of payment of taxes and the bottles with the invoices and tax returns, etc., would have established the dates of purchase of the gin in question. It is not an answer to this request for the production of the liquor in Court—what amounts to “*corpus delicti*”—that the Government admits that all these bottles bore proper revenue stamps because such admission would cause these proceedings to fail because such liquor would not then be “contraband.” The liquor and the containers might be stamped with the date that the tax was paid thereon. It is probable that said containers, with the invoices and liquor store sales slips, pertaining thereto, would show the dates of their respective purchase.

Certainly, intervenors had a right to have the liquor produced in court and to cross-examine Government’s witnesses with relation thereto.

The refusal of these two requests was a reversible error on the part of the Court below and the error is manifest from the minutes of the Court, without the necessity of a formal stenographic record herein.

III.

The Court erred in denying and overruling the Motion of Claimants and Intervenors to dismiss the proceedings, made at the close of all the evidence on all the grounds stated in said motion.

The Court erred in entering a Judgment of For-

feiture and entering a Decree against Claimants and Intervenors, herein.

The Court erred in overruling and denying Claimants and Intervenors' Motion for Rehearing, New Trial or Review on all the grounds stated in said motion.

At the close of the Government's case, intervenors filed a Motion to dismiss the Libel of Information and to refuse condemnation (R. 57). (See Minutes—R. bottom page 33, top page 34.) This Motion was denied by the Court and it is appellants' contention that the Court below erred in denying the Motion to Dismiss and that the findings of fact and conclusions of law of the Court below (R. 59-65) and the Decree of Condemnation based thereupon (R. 65-68) were each and both erroneous. In making this contention, appellants recognize the rule that in the absence of the transcript of the testimony, every presumption would be indulged by this Court in favor of the sufficiency of the proof below. Yet, we call to the attention of this Court that the Libel of Information is the same form used by the Government for the confiscation of illicit liquors in the days of the National Prohibition Act and in cases of the illicit manufacture of so-called "Moonshine Whiskey."

It stands admitted here that appellants, at the time of this seizure, were retail liquor dealers, licensed as such by the United States. The allegations of the libelant (Par. V, R. p. 4) are that on the 20th day of April, 1943, the Internal Revenue officers went into the premises of the appellants and "found therein and upon said premises, certain distilled spirits, in bottles, on which

the above named tax was imposed, and upon which, said tax had not been paid."

This allegation is equivalent to an allegation that no return was made as required by *subsection (2) of Section 2800 (j), Title 26, U. S. C., reading:*

"(2) Returns. Under such regulations as the Commissioner with the approval of the Secretary shall prescribe, every person required by paragraph (1) to pay any floor stocks tax shall, on or before the end of the thirtieth day following the effective date of Title VI of the Revenue Act of 1942 make a return and shall, on or before the first day of the third month following such effective date, pay such tax. * * *"

and by the regulations promulgated by the Commissioner for the collection of the tax levied by *subdivision (j) of Section 2800 of Title 26, U. S. C.*

However, the minutes of the Court show (R. 32) that the Government introduced in evidence without objection, Plaintiff's Exhibit 1 by witness Neil D. McCarthy and Plaintiff's Exhibit 2 by witness John H. Cosgriff. It does not appear in the record as presented, but for the information of the Court, Neil D. McCarthy testified that Exhibit 1 (R. 41) was an official record of the collector's office, and John H. Cosgriff, who was the agent in charge of the Alcoholic Tax Unit of the Internal Revenue Bureau testified that Exhibit 2 was an official record of his office.

These Exhibits are before this Court (R. 41-53).

Therefore, it affirmatively appears upon the record that these appellants *did* make a return of their taxes levied under *Section 2800 (j)* and that in the return showed that they had on November 1, 1942, 112.28872

proof gallons of distilled spirits (R. 42); and the Record further shows the Collector of Internal Revenue filled in:

| | |
|----------------------------|---------------------------|
| "Received with Remittance | |
| Nov. 30, 1942 | "Dec. 2, 1942.....5107 |
| Helena, Montana | Amount due .....\$228.51 |
| Collector Internal Revenue | Amount paid.....\$228.51" |
| R. p. 42.) | |

The Government here has proceeded to enforce a forfeiture on the same basis as if no tax returns were filed based on the contention that a small portion of liquor, to-wit: thirteen pints and one quart of Cavalier Gin were omitted from the return (R. 34, lines 9-10; Demand page 30).

Defendant's Exhibit 3, which was the Government's list of seized liquor, discloses that the one quart of Cavalier Gin seized contained .20 proof gallons and that the thirteen pints of Cavalier Gin involved 1.30 proof gallons, a total of one and one-half proof gallons, for which alleged omission, \$3.00 in additional tax would have been due and payable, and upon this slender thread the libelant has thus far enforced a forfeiture of the entire stock of liquor of the claimants and intervenors herein.

Section 2800 (j), Subdivision (3) of the Revenue Act of 1942, Title 26, provides:

"All provisions of law, including penalties, applicable in respect of Internal Revenue taxes on distilled spirits shall, insofar as applicable and not inconsistent with this subsection, be applicable in respect of the floor stocks tax imposed hereunder."

Section 2800, Title 26 and the following Sections all deal with *distillers* and *wholesale liquor dealers*. It is highly questionable whether or not *Section 2800 (j)* has any applicability whatever to retail liquor dealers.

Walker vs. U. S. (C. C. A. 4th) 104 F. 2d 465.

However, assuming that the law does apply to retailers, *Section 3720*, under which these proceedings were brought provides in subdivision (a) (1):

"All goods, wares, merchandise, articles, or objects on which taxes are imposed, which shall be found in the possession, or custody, or within the control of any person, for the purpose of being sold or removed by him *in fraud of the internal revenue laws, or with design to avoid payment of said taxes*, may be seized, and shall be forfeited to the United States."

"It is well established that an erroneous or incorrect return is not necessarily a fraudulent return and that because a return is incorrect, that fact does not invoke the penalties for fraud."

National Bank of Commerce vs. Allen, (C. C. A. 8th) 223 Fed. 472, 478;

Eliot National Bank vs. Gill, 218 Fed. 600, 603;

U. S. vs. Tillinghast (C. C. A. 1st) 69 Fed. 2d, 718;

Wilson Bros. vs. Commissioner of Internal Revenue (C. C. A. 9th) 124 Fed. 2d 606, 611.

In a comparatively recent case, this Court in an income tax case clearly defined the difference between the penalties consequent upon the filing of no return and those incurred, if any, by reason of a false or incorrect return.

Lane-Wells Co. vs. Comissioner of Internal Revenue, (C. C. A. 9th) 134 Fed. 2d 977.

See also Sections 3612 to 3616, Title 26, U. S. Code.

Under *Section 3720* and under a long line of decisions, it is necessary for the Government to plead and prove that the return made by the appellants was false and in fraud of the Internal Revenue laws and with design to avoid payment of taxes.

The Court in its findings of fact (R. 62) did not find any fraud with reference to the making of the return (Exhibit 1) and did not find specifically that Exhibit 1 was even false or incorrect. The conclusions of law proceeded upon the same theory, as did the Libel of Information, namely, that this was a "no return case" and that appellants were bound to include in their return every bottle of liquor on the premises and that in case of omission or mistake that they forfeit to the United States their entire stock in liquor. This was not and is not the law, where as here, the possession of the liquor was not illegal and not illicit and where appellants were licensed retail liquor dealers.

As was said by the Circuit Court of Appeals of the Seventh Circuit in *Griffiths vs. Commissioner of Internal Revenue*, 50 Fed. 2d 782 on this same subject:

"The remaining question before us is whether petitioner was guilty of fraud with intent to evade the tax in making his return on March 14, 1920; and the burden of proving such fraud was upon respondent. Fraud is never presumed but must be

determined from clear and convincing evidence, considering all the facts and circumstances of the case, and the presumption of Commissioner's correctness does not extend to his determination that fraud existed. (*J. B. Jemison vs. Commissioner of Internal Revenue (C. C. A.) 45 F. (2d) 4.*)

What is said in the case last cited also applies to the case here at bar. The affidavits offered to the Court on Motion for New Trial, and likewise the evidence which appellants attempted to place before the Court at the trial were to the effect that one of the appellants, Haft, took a physical inventory of the liquors in his place of business after midnight on October 31, 1942 and took the inventory up to John J. Walsh, a certified public accountant, for the purpose of having the proper returns made up; that John J. Walsh, the accountant, referred the matter to McGarry, one of his employees and that McGarry made up the return.

McGarry's affidavit shows that on the inventory was an entry of "Gin 80 proof, 3 quarts, 24 pints and 16 half pints." and that on the final return he changed the return 80 proof gin to 90 proof and called the same "Old Boston," whereas there was no name on original inventory." Another gin entry was "gin 85 proof, 12 half pints." The third was "Gin, Old Boston," 90 proof, 48 half pints;" and that he could not find in his liquor store list an 80 proof gin so he substituted the name "Old Boston Gin" at 90 proof. It was an error on his part

and resulted in having the taxpayer pay taxes upon the said forty-three bottles of gin on the basis of 90 *proof* instead of 80 *proof*, an increase of 12½%—"so that Haft and Boyle actually paid 12½% more tax upon the gin in question than they should have properly paid." (R. 84-85.)

The language of the Circuit Court of Appeals in the case last cited relative to the mistake of a bookkeeper is particularly relevant here.

Griffiths vs. Commissioner of Internal Revenue,
50 Fed. (2d) 782, 786.

We also contend that because revenue officers entered the place of business of the claimants on April 20, 1943 and found the gin upon which they contend that no tax was paid that that fact does not prove or tend to prove that that gin was in the possession of the claimants on November 1, 1942, and that the fact of possession on April 20, 1943 does not give rise to a presumption which works retroactively so that that is no proof at all of a possession on November 1, 1942.

Corbin vs. U. S. (C. C. A. 6th) 181 Fed. 296.

We submit that this point is actually determinative of this entire case and that the failure of the Court to find that Exhibit 1 was a fraudulent return made with intent to evade the payment of taxes is fatal to the Decree of Forfeiture herein and entitles appellants to a reversal of the Judgment with directions to dismiss the proceedings.

Conclusion

Appellants submit that on the record herein submitted, wherein the transcript of the testimony and the lengthy interpolations of his opinions by the trial judge have been omitted, that still it appears affirmatively from the minutes of the Court and from the Exhibits that the Court below clearly abused its discretion in refusing to recognize the compromise and in forcing appellants to trial after the statement of the District Attorney that the case was in the process of settlement.

It would be unconscionable for private litigants to enter into a settlement, retain the fruits thereof and then demand of a court that it proceed with the settled suit. It is none the less unconscionable here where the Government of the United States is involved.

We submit that on the pleadings and findings themselves, appellants are entitled to a dismissal of the action, and in the absence of this, to a reversal, with directions to grant a New Trial because of the errors complained of, i. e., the manifest of discretion by the Trial Court.

Respectfully submitted,
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Attorney for Appellants.

Service of the foregoing Appellants' Brief acknowledged and three copies thereof received this 1st day of December, 1944.

John B. Tansil,
United States Attorney,

R. Lewis Brown,
Assistant United States Attorney.

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

JOSEPH P. BOYLE and EDWARD HAFT,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF
THE UNITED STATES FOR THE DISTRICT OF
MONTANA.

Brief of Appellee

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ATTORNEYS FOR APPELLEE.

FILED

JUN 20 1920

PAUL P. O'BRIEN,
CLERK



TOM
Greenfield
INC

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v.
UNITED STATES OF AMERICA,
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BRIEF OF APPELLEE

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No. 10874

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

JOSEPH P. BOYLE and EDWARD HAFT,
Appellants,
v.
UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLEE

STATEMENT

The appellants seek a reversal of this cause because of claimed error in the entry of the judgment and because of the claimed error of the Court in denying their motion for re-hearing, new trial or review, and have in their brief set out eleven specifications of error. The first nine of the specifications of error charge error on the part of the

Court, committed during the progress of the trial of the cause. 'The tenth charges the Court erred in entering its decree and the eleventh that the Court erred in overruling the motion of appellants for a rehearing, new trial or review.

The appellants, in their brief, have purported to make a statement of facts. We do not agree that the statement is correct as it relates to the appellants' principal contentions for a reversal. In any event it is not based upon anything found in the record, or properly a part of it. We are precluded from setting out our version of what the facts are, as there is nothing in the record which discloses the actual facts other than the Findings of Fact of the Court, and we thus rest on those Findings of Fact made by the Court as being the actual facts in the case upon which the law questions presented to this Court, if any are presented, are to be solved.

ERRORS 1 TO 9 INCLUSIVE PRESENT NO QUESTION TO THE COURT FOR DECISION.

The record in the case discloses that the appellants have not incorporated in the record any statement of the evidence received by the trial Court, or offered and rejected, and of the proceedings had during the trial of the case. There is nothing properly in the record other than the judgment roll and as Errors 1 to 9 inclusive relate to proceedings had and taken by the trial Court during the progress of the trial of the case, and without such proceedings being made a part of the record, the appellants have precluded the Court from any review.

It is a universal rule that error is never presumed. The burden is on the appellant to establish it.

That this Court is confined to the statement of the evidence for what transpired at the trial, is, of course, settled by it. In

Taylor v. Merrill, 104 Fed. (2d) 710, at 711,
this Court said:

“Appellant’s assignments of error contain what is claimed to be a statement of the objections and their grounds with excerpts of what purports to be the pertinent evidence, but we are confined to the bill in determining what transpired at the trial.”

In

United States v. Foster, 123 Fed. (2d) 32 at 34,
this Court said:

“The appellant has failed to bring before us such a record as would compel an overthrow of the findings made below, and the presumption of correctness which attaches to the findings made by a trial court is sufficient to withstand an attack of the sort here made, upon an obviously incomplete record.”

In

Rosenblum v. Anglim, 135 Fed. (2d) 512 at 513,
this Court said:

“Evidence was received at the trial, but was not made a part of the record on appeal. Therefore the trial court’s findings of fact must be accepted by us as correct.”

In

Isaacs v. De Hon, 11 Fed. (2d) 943 at 944,
this Court said:

“It is argued that the findings are not supported by the evidence. The evidence has not been made a part of the record, and we cannot notice this assignment of error.”

THE COURT DID NOT ERR IN ENTERING A DECREE AS ASSERTED IN SPECIFICATION OF ERROR NUMBER 10.

In

Bogan v. Hynes, 65 Fed. (2d) 524 at 525,
this Court said:

"This case was tried without a jury and there is no bill of exceptions or statement of the case in the record. Therefore, the only question involved on this appeal is whether or not the findings support the judgment."

As the situation here is similar, likewise the only question here involved is whether or not the findings support the judgment.

As we read appellants' brief, there is no contention made by them that the findings, if correct, do not support the judgment.

The proceedings were initiated by the government under an existing Act of Congress, viz., Section 3720, Title 26, U. S. C. There are various paragraphs in that Section, two of which relate to the conditions as existed here and under which the libel of information was drawn, and the Section as applicable here is as follows:

"No. 3720. Seizure of forfeitable property.

(a) Property subject to seizure and forfeiture,

(1) Manufactured articles. All goods, wares, merchandise, articles, or objects, on which taxes are imposed, which shall be found in the possession, or custody, or within the control of any person for the purpose of being sold or removed by him in fraud of the internal revenue laws, or with design to avoid payment of said taxes, may be seized, and shall be forfeited to the United States.

(3) Equipment. All tools, implements, instru-

ments and personal property whatsoever, in the place or building, or within any yard or inclosure where such articles or raw materials are found, may also be seized, and shall be forfeited as aforesaid."

The libel of information alleges that on April 20, 1943, there was seized 406 bottles of distilled liquor, consisting of whiskey, brandy, rum and gin, at a designated place in Butte, Montana; that the premises on which the seizure was made were used and occupied as a saloon and a place where distilled spirits, upon which an Internal Revenue tax was imposed, were held, intended for sale and sold for beverage purposes, and on the 20th day of April, 1943, the Internal Revenue officers of the United States entered the premises and there found certain distilled spirits in bottles on which a revenue tax was imposed, but had not been paid, and in addition found therein other quantities of distilled spirits in bottles, and that the distilled spirits in bottles found therein at that time, upon which the tax had been imposed and had not been paid were there kept, maintained and had for the purpose of being sold or removed by the owners thereof and the persons operating the business in fraud of the Internal Revenue laws of the United States, or with design to avoid payment of said taxes so levied and assessed upon such spirits, and that by reason thereof such distilled spirits and all other distilled liquors in said place or building became subject to seizure and forfeiture to the United States. The facts alleged in the libel of information bring the case within the Section and authorized not only the seizure of such distilled liquor as was found at that time therein, but likewise all other distilled liquor in the same premises found therein at the time.

United States v. Ryan, 284 U. S. 167.

As we read the statute, the seizure is not dependent upon whether a return is or is not made, or whether a return, if made, is entirely false or only partially false. We find no justification for the conclusion drawn by the appellants that from the language in the libel that the officers found therein and upon said premises certain distilled spirits, in bottles, on which the above named tax was imposed, and upon which said tax had not been paid, to be an allegation that no return was made. Certainly as to the untax paid liquor found on the premises no return was made as to that. However that might be, whether there was or was not untax paid liquor on the premises at the time of the seizure, whether the same was there held in fraud of the revenue of the United States and with intent to be sold in fraud of the revenue of the United States or held or to be sold with design to avoid the payment of the taxes due the United States, and whether the untax paid gin that was seized by the officers on April 20, 1943, was possessed by the appellants on November 1, 1942, were all questions of fact to be established by the evidence and to be resolved by the trial Court in the first instance, and without a statement of the evidence in the record, this Court has nothing to review and thus accepts the findings of fact in that regard as made by the Court as correct.

NO ERROR WAS COMMITTED BY THE TRIAL COURT IN DENYING APPELLANTS' MOTION FOR REHEARING, NEW TRIAL OR REVIEW AS CHARGED IN SPECIFICATION OF ERROR NUMBER 11.

The gravamen of the appellants' complaint is that the trial Court refused to grant what they say was a motion for a continuance made 30 minutes after the hour set for the opening of the trial. As the motion, if made, was part of the proceedings had at the trial, and no statement of the evidence, testimony and proceedings was prepared by appellants, apparently the purpose of filing the motion for a new trial, rehearing or review was solely to attempt to make their own record of what transpired at the trial in the form of *ex parte* affidavits of themselves, their employees and their counsel, and the motion for new trial served no other purpose. This we believe an abortive attempt as the record of what transpired at the trial could not be made in such a manner. The so-called motion commences at page 69 of the record and claims irregularities in the proceedings of the Court had at the trial in different particulars.

The record discloses that on December 13, 1943, the Court set the trial of this case for December 21st at 10:00 o'clock, that notices were given and that the appellants' attorney received the notice on December 14th (R. 35); that between those dates no motion for any continuance of the cause or for a vacating of the setting was filed. Counsel for appellants concedes those things, but contends that an offer in compromise was made and accepted

and that such being the case he felt that the matter was concluded; that he did not notify his clients of the setting of the case, did not prepare for trial and did not appear for trial at 10:00 o'clock on the day the trial was called. He further says he thought the office of the United States Attorney would join him in moving for a vacation of the setting of the trial or a continuance of its date, or that a motion for dismissal of the action would be made by the appellee. He is not exactly certain which state of facts he assumes and includes the first in Paragraph 1 (a) of his motion and the other in Paragraph 4. He did not subpoena either of his clients as witnesses or make any effort to have them at the trial. The minutes of the Court disclose (R. 32) that when the counsel finally appeared in court, he stated to the Court "that an offer in compromise has been made and he did not think that the case would be tried until the offer had been disposed of, and now moved the Court to continue the trial of this case until next Monday morning at 10:00 o'clock." The Court stated the motion for a continuance should be made in writing and noticed for hearing. The Court, of course, was correct in this, as that was the proper procedure and the counsel had all of the facts within his knowledge on the 14th of December, when he received the notice of the setting of the case for trial that he had on the 21st.

From the denial of that motion the appellants assert the Court denied the right of the United States Attorney and the Bureau of Internal Revenue authorities to compromise the case without the consent of the Court. Of course, the Court made no such denial. The right of anybody to compromise the case was not an issue in the case, was

not considered by the Court and not determined by the Court.

If the Court had denied the right of the officials of the Internal Revenue Department or of the United States Attorney to compromise the case, the Court would have been doing nothing except correctly stating the law, as neither had any such right. Section 3761, Title 26, U. S. C., cited by the appellants, did not give the Internal Revenue officials any power to compromise this case. It does give to the Commissioner, with the approval of certain designated officials, the power to compromise any civil or criminal case arising under the Internal Revenue laws prior to its reference to the Department of Justice, and specifically vests in the Attorney General the sole power to compromise after such reference. Under no circumstances has the United States Attorney authority to compromise a case. All litigation in which the United States is a party is in the hands of the Attorney General and he, and he alone, has such authority.

U. S. v. Hon. Pierson M. Hall, Judge, etc. (C. C. A. 9th, decided Nov. 25, 1944).

Apparently the position taken now by the appellants is that an offer of compromise, which has been submitted to the Attorney General and has not been accepted, deprives the Court of jurisdiction to try the case until it is accepted or rejected. Appellants cite no authority to that effect. It is not the law so far as we know. It was most certainly not the theory of counsel for the appellants at the time he made the motion, because he simply moved that the Court continue the trial of the case until the following Monday. It was certainly not known by him whether the

offer in compromise would be passed on by that time or not, and he apparently thought the Court would have jurisdiction to try the case at that time whether it was or was not passed on.

It is significant to note from the record that the only ground set out by counsel for his continuance was that he thought the case should not be tried until the offer in compromise was disposed of. He did not at that time inform the Court he thought the case had been compromised, that he thought the appellee would dismiss the case as it was disposed of, or would unite with him in requesting a motion for a continuance or that he was not prepared to go to trial, or did not have the necessary witnesses present, or for any of the other reasons that he sets forth in his brief. These were all manufactured out of whole cloth as an afterthought and simply for the purpose of attempting to make a record by ex parte affidavits to put the Court in error. There was filed the counteraffidavit of Assistant United States Attorney Brown (R. 94), the attorney who commenced the case, who was in exclusive charge of it at all times to the knowledge of appellants' counsel, who tried it and personally appeared at all of the proceedings had from its commencement to the time of the denial of the motion for new trial, wherein it is set out that the day after the setting of the cause for trial, appellants' counsel discussed the question of a continuance of the trial with the affiant, the counsel in the case representing appellee, and that such counsel advised appellants' counsel that if appellants' counsel desired a continuance of the cause, he, appellee's counsel, would accompany him, the appellants' counsel, to the Court, would inform the Court

of the status of the compromise and would not oppose any motion for a continuance that counsel desired to make, and the affiant further informed the appellants' counsel that if he, such counsel, did not do that the case would be tried at the date set. It is further set out that appellants' counsel never came to the affiant's office, never requested him to accompany appellants' counsel to the Court at any time after the conversation. The statements made in the affidavit are in no wise challenged, impeached or contradicted.

In view of that condition it is inconceivable for us to understand how appellants' counsel can expect to impress anyone with the truth of his statement that he did not think the case would be tried on the day it was set. It is certain that he did not find the trial Court that gullible. However, this is his burden. The first irregularity he sets out is that the United States Attorney, as attorney for the libelant, did not join with him in the moving for a vacation of the setting of the cause for trial or a continuance of its date. The question naturally occurs is "Just when did he expect to move for a vacation or a continuance of the date so that the United States Attorney could join with him?" He certainly did not make the motion between the 14th of December, the date of his conversation with the Assistant in charge of the case and the 21st of December, the date set for the trial. He was not present in court at 10:00 o'clock, the hour set for the trial, to make the motion so that the United States Attorney could join with him in it if he did make it, and his contention there is an absurdity on the face of it.

The allegation that the appellants and appellee had pre-

viously agreed upon a settlement and compromise of the action is established to be not true by the affidavit of the appellants' counsel, for it clearly appears from that affidavit that the offer in compromise was made, was sent in to the Attorney General, was rejected by the Attorney General and that an Assistant United States Attorney, without authority either from the Attorney General or the intervenors, sent the offer back to the Attorney General (R. 80). Certainly after having knowledge that the Attorney General had rejected the compromise, there was small basis for hope that he would reverse his position.

The authorities cited by appellants in their brief, as to the effect of a compromise actually made by authorized officers of the government, are not in point—first, because in those cases the officers purporting to make the compromise actually had the authority to do so under the law, and second, because the fact situation here is different from those cases. There is nothing in the record here which establishes that the compromise was made at the solicitation of any officer of the government, that any promise of immunity was given, or that any money was paid to the government and retained by it. In any litigation in which the government is a party, a litigant has the right, if he desires, to make an offer in compromise, has the right, if he desires, to accompany the offer by a draft or check for a sum of money and mail it to the Attorney General. His act in so doing does not effectuate the compromise. The Attorney General has a right to either accept or reject it. The appellants exercised this right. They did send a draft in for \$446.26, 50% of the value of the liquor, but the inference that appellants attempt to leave, that the money

was retained by the government, is not true, as upon the rejection of the offer the draft was redelivered to the appellant and they have the money.

The affidavits as filed by the appellants and on their behalf, allegedly in support of a new trial, going into such detail as to the proceedings had at the trial, setting out testimony in detail that would have been offered had witnesses been subpoenaed make it manifest that they were filed solely to make a record of what transpired at the trial of the case. Had it been contended that the witnesses and the testimony they would have given were newly discovered, it would no doubt have been proper to have filed such affidavits. However, no such contention is made.

It is, of course, necessary, in requesting a continuance because of inability of the party to procure a witness, to make a timely motion and set out in the form of affidavits the testimony that it is expected the witness would give, together with facts showing diligence in attempting to procure the testimony and in making the application.

Engelstad v. Dufresne, 116 Fed. 582;

Copper River Mining Co. v. McClellan, et al., 138 Fed. 333;

Alaska Anthracite R. Co. v. Moller, 257 Fed. 511.

All of the above are from this Court.

However, the appellants did not follow this procedure in moving for a continuance. Apparently a like attempt to amplify a record was before the Circuit Court of Appeals of the Fifth Circuit in

City of Coral Gables v. Hayes, 74 Fed. (2d) 989 at 990:

"There is no bill of exceptions. We do not know what happened when the date for trial was fixed, or

that any objection was made. There are some recitals about it in the motion for continuance later filed, but they are uncertified by the judge. The same trouble exists touching the ruling on the motion for continuance. The motion and order on it, which recites an exception taken, are certified here as parts of the record. If we consider them as a sufficient substitute for a bill of exceptions, we find no abuse of discretion shown. Only one witness was alleged to exist, and no effort to secure his presence or his deposition appeared. If present, his testimony would have done no good."

However, the trial Court, in considering the motion, was not limited to the recitals contained in the affidavits of the appellants, their employees and their counsel and was not compelled to accept as facts the conclusions set out in those affidavits as to claimed contentions and beliefs. The Court had before it and could properly consider the counter- affidavit of the Assistant United States Attorney, who handled the case from its inception and who was conversant with all of the facts, and equally had before it and could consider all of the testimony given at the trial of the case and all of the proceedings had at the trial, and whether the motions, that it is claimed in the affidavits were made at the trial upon the grounds and for the reasons therein set out, were actually so made at the trial, and were upon those grounds. In that respect the Court could consider and did consider the truth of the recitals in the affidavits as to the proceedings had at the trial of the case. The Court likewise, in considering the contention made by the appellant Haft, of his actually inventorying the 13 pints and 1 quart of gin, containing 1.50 proof gallons, upon which a tax of \$3.00 was due, and

the statements contained in the affidavit as to the bonafides of the employee of Haft, the accountant, in changing that inventory to reflect a different brand name and a different proof, with all of the evidence in the case, could consider in that regard the evidence establishing the great quantity of distilled liquor that was not returned to the Internal Revenue authorities and which was disposed of between the first day of November when the tax was due and the 20th of the following April when the officers entered the premises. A portion of this quantity is set out in the affidavit of Haft himself at page 90 of the record, where he recites that although he inventoried 16 cases of Barclay whiskey, it was overlooked by the accountant and no return was made of it. That 16 cases amounted to 48 gallons, and as there is no testimony in the record, the Court is precluded from learning the additional large quantity that was likewise not returned. However, the trial Court knew what the evidence was in that regard and the trial Court knew that the government was not going into this place of business and seize its entire stock of goods solely because 1.50 proof gallons of distilled spirits, upon which a tax of \$3.00 was due, was omitted from the return made, and the appellants and their counsel know that to be the fact, irrespective of their contrary statement in their brief.

This Court in

Bateman v. Donovan, 131 Fed. (2d) 759 at 764,
said:

“It is so well established as not to require citation of authority that the order denying a new trial is discretionary with the trial court and may be reviewed only for a clear abuse of authority. So in this con-

nection the matter for our determination is whether the matter set forth in the juror's affidavit was such as to compel the granting of a new trial and whether there was an abuse of discretion in its denial."

We respectfully submit that there was nothing before the trial Court that compelled it to grant a new trial and that no abuse of the trial court's discretion or misuse of its power in that respect was established.

As it appears from the record, the appellants' counsel knew the case was set for trial and knew that if he did not get a continuance it would be tried. If he had any legal grounds for continuance on the day of the trial, they were all in existence and within his knowledge at the time he received the notice and he had full and ample opportunity to make the proper motion coupled with the proper showing. If he desires to adopt the practice of not notifying his clients when cases are set for trial, that is a matter between himself and his clients. The practice is of such hazard that counsel generally do not adopt it, and certainly his practice in that regard furnishes no grounds for a continuance. If the record discloses anything here, it discloses complete and utter indifference and disregard of the actions of the Court in setting a case for trial; for him to adopt that attitude of indifference and disregard of the Court and of its convenience, and permit the Court to allocate its time and hold itself in readiness to perform its official duty as Judge at the time set, and allocating the time of the attaches of the Court in attendance upon it, and permit the adversary to go to the expense of subpoenaing his witnesses, preparing for trial and attending at the time set for trial, and then hope to contend with

success that because of his complete neglect, indifference and disregard, all of those things done by all of the others are in vain, requires a degree of self-assurance which is rarely encountered.

One power that the Court does not have is the power to compel a party litigant to appear in court at the time set for trial and participate in it. A litigant has a right not to appear if he does not desire to appear, but by so doing he cannot prevent the other person from having his day in Court. From the record in this case, there is absolutely no more assurance that the appellants would appear at a second trial if a reversal were had than they did at the first trial.

APPELLANTS COMPLAIN AT THE REFUSAL OF THE COURT TO REQUIRE APPELLEE TO PRODUCE LIQUOR IN THE COURT, TO PRODUCE RECORDS AND TO PERMIT THE WITNESS MCGARRY TO FURTHER REMAIN ON THE WITNESS STAND.

A substantial portion of appellants' brief is addressed to these questions. They are not before this Court as no transcript of the testimony or proceedings had at the trial is incorporated in the record, and would not be commented upon except for certain statements made in appellants' brief.

At page 28 the appellants contend it was the contention of the intervenors that the bottles themselves would have disclosed stamps or other evidences of payment of taxes. We do not know when appellants adopted that contention. The payment of the floor stocks tax was not evidenced

by any stamp put on the bottles themselves. Upon interrogation by the Court, during the progress of the trial, counsel conceded such to be the fact and informed the Court that none of the bottles had any stamp on them evidencing the payment of this floor stocks tax.

With reference to the production of the books and papers, which appellants complain of, they, of course, had ample opportunity to make a demand therefor, or to issue a subpoena duces tecum to the custodian and they did neither. However, there was certain interrogation by the Court to counsel as to the purpose of the production and what he desired to prove thereby and answers made to those interrogations by counsel, none of which, of course, appear in this record and which further furnished a basis for the ruling of the Court.

With reference to the witness McGarry, had a record been produced with the remarks of the Court in it, as well as counsel, the reason for the action of the Court would have been apparent. Even on this record, the query naturally arises whether the demand for the production of all of the records and the insistence upon maintaining the witness McGarry on the stand by counsel was not in furtherance of his defiance of the Court and threat made to the Court to stall the case through the afternoon for the purpose of securing the attendance of another witness who was not subpoenaed and not present (R. 35).

CONCLUSION.

Appellants characterize the result as a miscarriage of justice and said that it was brought about by the denial of

the trial Court of the power to compromise, created by Section 3761 of Title 26, U. S. C.

We see no justification in the record for either of the statements and there is no reason to believe that the same result would not be reached, irrespective of the number of trials had.

We feel the case was prolonged and the appeal had because of the action of the Assistant United States Attorney in charge of the case in requesting the Court for a short recess to permit him to communicate with the counsel for the appellants when he did not appear in Court at 10:00 o'clock when the case was called for trial. This action was taken because of the practice of the United States Attorney of not entering a default in a case in which an appearance has been made, without communicating with the opposing counsel for the purpose of determining whether or not the counsel had suddenly become ill, or because of circumstances beyond his control had been prevented from appearing in court or notifying the United States Attorney's office or the Court that he was unable to appear. This practice of the United States Attorney has been general. The instances in which it has not been appreciated by opposing counsel, but on the contrary they have attempted to take advantage of it, have been so rare as not to convince the United States Attorney that the practice is bad and should be stopped, but only in the future to be exceedingly careful in his dealings with those who have so attempted.

We respectfully submit that the record discloses nothing insofar as appellants are concerned except negligence and a complete, unwarranted and inexcusable inattention

to their interests and it could not reasonably be expected that any court would give more attention to their interest than they themselves gave; that no matter what effect their indifference and neglect might have upon their interest, certainly they cannot use it for the purpose of penalizing the other party to the litigation, who was neither neglectful or indifferent to the Court or to its own interests; that the trial Court in all of the proceedings had scrupulously followed the law as it is written; that the decree entered is proper and just and that the case should be affirmed.

Respectfully submitted,

JOHN B. TANSIL,
United States Attorney,

R. LEWIS BROWN,
Assistant U. S. Attorney,

HARLOW PEASE,
Assistant U. S. Attorney.

No. 10886

United States
Circuit Court of Appeals
For the Ninth Circuit.

FEDERAL FARM MORTGAGE CORPORA-
TION, a corporation,

Appellant,

vs.

HENRY ANDREW PAULSEN,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Nevada

FILED

NOV 18 1944

PAUL F. O'BRIEN,
CLERK

No. 10886

United States
Circuit Court of Appeals
For the Ninth Circuit.

FEDERAL FARM MORTGAGE CORPORA-
TION, a corporation,

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for the District of Nevada

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

PERCY A. SMITH, ESQ.,

2180 Milvia Street,
Berkeley, California,

For the Appellant, Federal Farm Mortgage
Corporation.

MESSRS. WITHERS & EDWARDS,

153 North Virginia Street,
Reno, Nevada,

For the Appellee, Henry Andrew Paulsen.
[1*]

In the District Court of the United States,
In and For the District of Nevada

No. A-33-A in Bankruptcy

In the Matter of

HENRY ANDREW PAULSEN,

Bankrupt.

DEBTOR'S PETITION

To the Honorable Frank H. Norcross, Judge of the
above entitled Court:

The petition of Henry Andrew Paulsen of Churchill County, Fallon, Nevada, and District of Nevada, respectfully represents:

That he is primarily bona fide personally engaged in producing products of the soil and in the raising of hogs; that such operations occur in Churchill County, Nevada, within said judicial District; that he is unable to meet his debts as they mature and that he desires to effect a composition or extension of time to pay his debts under Section 75 of the Bankruptcy Act.

That the schedule hereto annexed, marked "A", and verified by your petitioner's oath, contains a full and true statement of all his debts, and the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said Act.

That the schedule hereto annexed, Marked "B", and verified by your petitioner's oath, contains an accurate inventory of all his property, both real and personal, and such further statements concerning

said property as are required by the provisions of said Act. [2]

Wherefore, your petitioner prays that his petition may be approved by the Court and proceedings had in accordance with the provisions of said section.

HENRY ANDREW PAULSEN

Petitioner

PAINTER, WITHERS &

EDWARDS

By L. S. WITHERS

Attorneys for Petitioner

I, Henry Andrew Paulsen, the petitioning debtor mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information and belief.

HENRY ANDREW PAULSEN

Petitioner

Subscribed and Sworn to before me this 6th day of March, 1939.

[Seal]

ADELINA PAGNI

Notary Public in and for the County of Washoe,
State of Nevada. [3]

Form 2-4

Schedule A

STATEMENT OF ALL DEBTS OF BANKRUPT

Schedule A-1

Statement of all Creditors who are to be paid in Full, or to
Whom Priority is Secured by Law.

| | Amount |
|---|-----------|
| 1. Taxes and debts due and owing to the United States for the year 1938, approximately..... | \$ 125.00 |
| 2. Taxes due and owing to the State of Nevada for the year 1938, approximately | 125.00 |
| 3. Wages due workmen, clerks, or servants to an amount not exceeding \$600 each earned within three months before filing the petition: None | none |
| 4. Other debts having priority by law: None..... | none |
| Total..... | \$ 250.00 |

HENRY ANDREW PAULSEN
Petitioner

These schedules must be executed in triplicate. [4]

Form 3-4

Schedule A-2

CREDITORS HOLDING SECURITIES

(N. B.—Particulars of securities held, with dates of same, and when they were given, to be stated under the names of the several creditors, and also particulars concerning each debt, as required by Acts of Congress relating to bankruptcy and whether contracted as partner or joint contractor with any other person, and if so, with whom.)

This schedule includes liens, pledges, mortgages, notes, etc.

Amount of Debts

Walter C. Dean, Frank R. Hodgson and H. W. Brown-
ing, as trustees under a trust deed recorded Septem-
ber 28, 1935, in Book 15, page 55 of Mortgages in
the office of the Recorder of Churchill County, Nev-
ada, to secure an indebtedness of \$5500.00, plus ac-
cumulated interest and taxes, approximately.....\$7,000.00

| | |
|--|------------|
| I. H. Kent Company, Fallon, Nevada, two (2) promissory notes totaling \$1,000.00, plus accumulated interest, secured by a mortgage upon all hogs, one (1) Case harvester, and a second mortgage on a 1935 Oldsmobile sedan | 1,000.00 |
| Mountain Finance Company, Reno, Nevada, secured by a first mortgage on a 1935 Oldsmobile sedan..... | 244.30 |
| Total..... | \$8,244.30 |

HENRY ANDREW PAULSEN
Petitioner.

Note.—Give street and number address where possible. [5]

Form 4-8

Schedule A-3

CREDITORS WHOSE CLAIMS ARE UNSECURED

(N. B.—When the name and residence (or either) of any drawer, maker, indorser, or holder of any bill or note, etc., are unknown, the fact must be stated, and also the name and residence of the last holder known to the debtor. The debt due to each creditor must be stated in full, and any claim by way of off-set stated in the schedule of property.)

| | Amount |
|--|-----------|
| St. Mary's Hospital, Reno, Nevada..... | \$ 122.65 |
| Dr. Byron H. Caples, Reno, Nevada..... | 50.00 |
| Dr. Earl Creveling, Reno, Nevada..... | 5.00 |
| Dr. A. L. Stadtherr, Reno, Nevada..... | 195.00 |
| Dr. H. W. Sawyer, Fallon, Nevada..... | 42.00 |
| Dr. H. K. Wilson, Fallon, Nevada..... | 35.00 |
| Fallon Flour Mill Co., Fallon, Nevada..... | 109.35 |
| Shell Oil Company, Fallon, Nevada..... | 21.53 |
| Fallon, Eagle, Fallon, Nevada | 25.00 |
| Eli, Cann, Attorney, Fallon, Nevada..... | 60.00 |
| Joe Mateas, Fallon, Nevada | 50.00 |
| Kolstrup Garage, Fallon, Nevada | 5.50 |
| Dr. Da Costa, Reno, Nevada..... | 25.00 |
| Dr. Piersal, X-Rays, Reno, Nevada..... | 15.00 |

| | |
|--|-----------|
| J. D. Mariner Music Co., Reno, Nevada..... | 15.00 |
| Mary Whiteman, Fallon, Nevada..... | 200.00 |
| <hr/> | |
| Total..... | \$ 976.03 |

HENRY ANDREW PAULSEN
Petitioner.

Note.—Give street and number address where possible. [6]

Form 5-4

Schedule A-4

LIABILITIES ON NOTES OR BILLS DISCOUNTED
WHICH OUGHT TO BE PAID BY DRAWERS,
MAKERS, ACCEPTORS, OR INDORSERS.

(N. B.—The dates of the notes or bills, and when due with the names, residences, and the business or occupation of the drawers, makers or acceptors thereof, are to be set forth under the names of the holders. If the names of the holders are not known, the name of the last holder *known* to the debtor shall be stated, and his business and place of residence. The same particulars as to notes or bills on which the debtor is liable as indorser.)

| | Amount |
|------------|--------|
| None | none |
| <hr/> | |
| Total..... | none |

HENRY ANDREW PAULSEN
Petitioner.

Note.—Give street and number address where possible. [7]

Form 6-4

Schedule A-5

ACCOMMODATION PAPER

(N. B.—The dates of the notes or bills and when due, with the names and residences of the drawers, makers and acceptors thereof, are to be set forth under the names of the holders; if the bankrupt be liable as drawer, maker or acceptors or endorser

thereof, it is to be stated accordingly. If the names of the holders are not known, the name of the last holder known to the debtor should be stated, with his residence. Same particulars as to other commercial paper.)

| | |
|------------|----------------|
| None | Amount none |
| Total..... | none |

HENRY ANDREW PAULSEN

Petitioner

OATH TO SCHEDULE A

United States of America

District of Nevada—ss.

On this 6th day of March, A.D. 1939, before me personally came Henry Andrew Paulsen, the person mentioned in and who subscribed to the foregoing Schedule A (1, 2, 3, 4, 5), and who being by me first duly sworn did declare the said Schedule to be a true statement of all his debts in accordance with the Acts of Congress relating to bankruptcy.

HENRY ANDREW PAULSEN

Subscribed and sworn to before me this 6th day of March, 1939.

[Seal]

ADELINA PAGNI

Notary Public in and for the County
of Washoe, State of Nevada. [8]

Form 7-4

Schedule B

STATEMENT OF ALL PROPERTY OF BANKRUPT

Schedule B-1—Real Estate

Estimated Value

All that certain piece or parcel of land situated in the County of Churchill, State of Nevada, more particularly described as follows:

The Northwest quarter of Section 12, Township 19 North, Range 30 East, Mount Diablo Base and Meridian, containing 160 acres more or less.

Subject to existing rights of way of record.

Together with all rights of every kind and nature,

however, evidenced, to the use of water, ditches

and canals for the irrigation of said premises....\$10,000.00

Total.....\$10,000.00

HENRY ANDREW PAULSEN,

Petitioner.

These schedules must be executed in triplicate. [9]

Schedule B-2—Personal Property

| | |
|--|----------|
| A. Cash on hand | \$ 45.00 |
| B. Bills of exchange, promissory notes, or securities of any description (each to be set out separately).... | none |
| C. Stock in trade in.....business of.....at..... of the value of: None | none |
| D. Household goods and furniture, household stores, wearing apparel and ornaments of the person, viz.: Household furniture, \$150.00; Wearing apparel, \$50.00 | 200.00 |
| E. Books, prints and pictures, viz.: None | none |
| F. Horses, cows, sheep and other animals (with number of each), viz.: 19 sows, 1 boar, 7 weanling pigs | 433.00 |
| G. Carriages and other vehicles, viz.: 1 - 1935 Oldsmobile sedan | 400.00 |
| H. Farming stock and implements of husbandry, viz.: Farm implements, \$400.00; blacksmith tools, \$50.00 | 450.00 |
| I. Shipping and shares in vessels, viz.: None..... | none |
| K. Machinery, fixtures, apparatus and tools used in business, with the place where each is situated, viz.: None | none |
| L. Patent, copyrights and trade-marks, viz.: None..... | none |
| M. Goods or personal property of any other description, with the place where each is situated, viz.: None | none |

HENRY ANDREW PAULSEN,

Petitioner.

(Full sets of schedule blanks must be filed. If there are no items applicable to any particular blanks, such fact should be stated in said blank. Each schedule sheet must be signed.)—
Rule 14. [10]

Form 9-4

Schedule B-3—Choses in Action

| | |
|---|----------|
| A. Debts due petitioner on open account: Chas. Maxwell, Fallon, Nevada, open account..... | \$ 47.00 |
| B. Stock in incorporated companies, interest in joint stock companies, and negotiable bonds: None.... | none |
| C. Policies of insurance: None | none |
| D. Unliquidated claims of every nature with their estimated value: None | none |
| E. Deposits of money in banking institutions and elsewhere: None | none |
| Total..... | \$ 47.00 |

HENRY ANDREW PAULSEN,
Petitioner. [11]

Form 10-4

Schedule B-4

Property in Reversion, Remainder or Expectancy, Including
Property Held in Trust for the Debtor or Subject to any
Power or Right to Dispose of or to Charge.

(N. B.—A particular description of each interest must be entered. If all or any of the debtor's property has been conveyed by deed of assignment, or otherwise, for the benefit of creditors, the date of such deed should be stated, the name and address of the persons to whom the property was conveyed, the amount realized from the proceeds thereof, and the disposal of the same, so far as known to the debtor.)

| General Interest | Particular Description | Supposed Value of My Interest |
|--|------------------------|-------------------------------------|
| Interest in land: None | | \$ none |
| Personal property: None | | none |
| Property in money, stocks, shares, bonds, annuities, etc.: None | | none |
| Rights and powers, legacies and bequests: None | | none |
| Property heretofore conveyed for benefit of creditors: None | | none |
| Total..... | | none |

| | Amount Realized from Proceeds of Property Conveyed |
|---|--|
| What portion of debtor's property has been conveyed by deed of assignment or otherwise for benefit of creditors; date of such deed, name and address of party to whom conveyed; amount realized therefrom, and disposal of same, so far as known to debtor: | none |
| What sum or sums have been paid to counsel, and to whom, for services rendered or to be rendered in this bankruptcy | \$ 50.00 |
| Total..... | \$ 50.00 |

HENRY ANDREW PAULSEN,
Petitioner. [12]

Form 11-4

Schedule B-5

A Particular Statement of the property claimed as exempted from the operation of the acts of Congress relating to bankruptcy, giving each item of property and its valuation; and, if any portion of it is real estate, its location, description and present use.

| | Valuation |
|---|-----------|
| Military uniform arms and equipments: None..... | \$ none |

Property claimed to be exempted by State laws; its valuation; whether real or personal; its description and present use; and referencees given to the statute of the State creating the exemption. (See State Law)

Household furniture and wearing apparel..... 200.00

Total.....\$ 200.00

HENRY ANDREW PAULSEN,
Petitioner [13]

Form 12-4

Schedule B-6

Books, Papers, Deeds, and Writings, Relating to Bankrupt's Business and Estate

The following is a true list of all books, papers, deeds, and writings relating to my trade, business dealings, estate, and effects, or any part thereof, which, at the date of this petition, are in my possession or under my custody and control, or which are in the possession or custody of any person in trust or me, or for my use, benefit or advantage; and also of all others which may have been heretofore, at any time, in my possession, or under my custody or control, and which are now held by parties whose names are hereinafter set forth, with the reasons for their custody of the same.

Books: None.

Deeds: None.

Papers: None.

HENRY ANDREW PAULSEN,
Petitioner.

OATH TO SCHEDULE B

United States of America
District of Nevada—ss.

On this 6th day of March, A. D. 1939, before me personally came Henry Andrew Paulsen, the person mentioned in and who subscribed to the foregoing Schedule B (1, 2, 3, 4, 5, 6) and who being by me first duly sworn, did declare *he* said Schedule to be a true statement of all his Estate, both real and personal, in accordance with the Acts of Congress relating to Bankruptcy.

HENRY ANDREW PAULSEN,

Subscribed and sworn to before me this 6th day of March, 1939.

[Seal]

ADELINA PAGNI

Notary Public in and for the County of Washoe, State of Nevada. [14]

Form 13-4

SUMMARY OF DEBTS AND ASSETS

(From the Statement of the Bankrupt in Schedules A and B.)

Schedule A—

| | | |
|-------------------------|--|--------------------|
| 1 (1) | Taxes and Debts due United States..... | \$ 125.00 |
| 1 (2) | Taxes due States, Counties, Districts and Municipalities | 125.00 |
| 1 (4) | Other debts preferred by law..... | none |
| 1 (3) | Wages | none |
| 2 | Secured Claims | 8,244.30 |
| 3 | Unsecured Claims | 976.03 |
| 4 | Notes and Bills which ought to be paid by other parties thereto | none |
| 5 | Accommodation Paper | none |
| Schedule A. Total | | <u>\$ 9,470.33</u> |

Schedule B—

| | | |
|-----|---|-------------|
| 1 | Real Estate | \$10,000.00 |
| 2-a | Cash on hand | 45.00 |
| 2-b | Bills, Promissory Notes and Securities..... | none |
| 2-c | Stock in Trade | none |
| 2-d | Household Goods, etc. | 200.00 |
| 2-e | Books, Prints and Pictures..... | none |
| 2-f | Horses, Cows and other Animals..... | 433.00 |
| 2-g | Carriages and other Vehicles | 400.00 |
| 2-h | Farming Stock and Implements | 450.00 |
| 2-i | Shipping and Shares in Vessels..... | none |
| 2-k | Machinery, Tools, etc. | none |
| 2-l | Patents, Copyrights, and Trade-Marks..... | none |
| 2-m | Other Personal Property | none |
| 3-a | Debts due on Open Accounts | 47.00 |
| 3-b | Stocks, Negotiable Bonds, etc. | none |
| 3-c | Policies of Insurance | none |

| | | |
|-------------------------|---|--------------------|
| 3-d | Unliquidated Claims | none |
| 3-e | Deposits of Money in Banks and elsewhere.... | none |
| 4 | Property in Reversion, Remainder, Trust, etc. | none |
| 5 | Property claimed to be exempted.... | \$200.00 |
| 6 | Books, Deeds and Papers | none |
| Schedule B, Total | | <u>\$11,575.00</u> |

HENRY ANDREW PAULSEN,
Petitioner.

[Endorsed]: Filed Mar. 6, 1939. [15]

[Title of District Court and Cause.]

ORDER

At Carson City, in said District, upon this 1st day of May, 1939:

This matter coming on to be heard upon the amendment of the petition of Henry Andrew Paulsen, requesting to be adjudged a bankrupt, as provided by Section 75, sub-section (s) of the Bankruptcy Act, and the same having been heard and considered, and it appearing to the Court that the said request should be granted;

It Is Ordered that the said Henry Andrew Paulsen be, and he is hereby, adjudged a bankrupt within the true intent and meaning of the Acts of Congress relating to bankruptcy, as provided by Section 75, sub-section (s) of the Bankruptcy Act as amended June 28, 1934, and that further proceedings be had in accordance with such section

before the Referee in Bankruptcy having jurisdiction of the case.

FRANK H. NORCROSS

United States District Judge.

[Endorsed]: Filed May 1, 1939. [16]

[Title of District Court and Cause.]

ORDER APPROVING APPRAISAL, SETTING
OFF EXEMPTIONS, AND STAYING PRO-
CEEDINGS

At Reno, Nevada, in said District, on the 5th day of February, 1940.

It appearing that the Report of the appraisers in the above entitled matter has been filed and all creditors of the bankrupt have received ten days' notice of the filing of the same and of this hearing thereon, and no written objections or exceptions having been filed thereto;

And it further appearing that the property of the bankrupt has been appraised at its then fair and reasonable market value, said appraisement is hereby approved, reserving the right to either party to file objections, exceptions and/or appeals with reference to the same within four (4) months of the date hereof as is provided in Section 75, Subsection (s) of the Bankruptcy Act.

And the Court coming now to set aside to the said bankrupt his exemptions as provided by State laws, Finds: that the bankrupt is entitled to hold as exempt, and It Is Ordered that there be set off

to him as exempt the following unencumbered property, to-wit:

All household table and kitchen furniture. [17]

All wearing apparel belonging to the bankrupt and his wife.

One (1) shot gun.

Farming utensils and implements of husbandry as shown by the inventory thereof heretofore filed herein, with the exception of the Case Harvester therein set forth.

All seed grain or vegetables actually provided, preserved or on hand for the purpose of planting or sowing at any time within the ensuing six (6) months, not exceeding in value the sum of Two Hundred Dollars (\$200.00).

One (1) boar

Twenty (20) sows

Four (4) young sows

One Hundred twenty-five (125) weaner pigs.

The Court further finds that the bankrupt is entitled to hold as exempt, and It Is Ordered that it be set off to him as exempt, his unencumbered interest or equity in the following described property, to-wit:

- All that certain piece or parcel of land situated in the County of Churchill, State of Nevada, more particularly described as follows:

The Northwest quarter of Section 12, Township 19 North, Range 30 East, Mount Diablo Base and Meridian, containing 160 acres more or less.

Subject to existing rights of way of record.

Together with all rights of every kind and nature, however evidenced, to the use of water, ditches and canals for the irrigation thereof.

Which said real property has been heretofore appraised at the sum of Three Thousand Dollars (\$3,000.00), and is subject to a mortgage lien held by Walter C. Dean, Frank R. Hodgson and H. W. Browning, as trustees under a trust deed recorded September 28, 1935, in Book 15, page 55 of Mortgages, in the office of the County Recorder of Churchill County, Nevada, to secure an indebtedness of \$5500.00, plus accumulated interest and taxes.

The equity of the bankrupt in one Case Harvester and in one 1935 Oldsmobile sedan being purchased from the Mountain Finance Company of Reno, Nevada, on a conditional sales contract upon which there is now due approximately \$114.00, which said property is subject to a mortgage lien of the I. H. Kent Company of Fallon, Nevada.

It Is Further Ordered that the possession, under the [18] supervision and control of the Court, subject to all existing mortgages, liens, pledges or encumbrances, of the following described property, which the Court finds is reasonable necessary for the farming operations of the bankrupt and of which he desires to remain in possession, shall remain in the bankrupt, to-wit:

All that certain piece or parcel of land situated in the County of Churchill, State of Nevada, more particularly described as follows:

The Northwest quarter of Section 12, Township 19 North, Range 30 East, Mount Diablo Base and Meridian, containing 160 acres more or less; subject to existing rights of way of record; together with all rights of every kind and nature, however evidenced, to the use of water, ditches and canals for the irrigation thereof.

Articles of husbandry as shown by the inventory thereof heretofore filed in this proceeding.

One 1935 Oldsmobile sedan.

Hogs as shown by the bankrupt's Second Report filed herein on the 5th day of February, 1940.

Which said real property has been appraised at the sum of \$3,000.00, and which said personal property has been appraised at the sum of \$2,057.50.

It Is Further Ordered that, as provided in said Section 75, Subsection (s) of the Bankruptcy Act, the bankrupt pay rental in the sum of Five Hundred Fifty Dollars (\$550.00) to be paid annually on or before the first day of October of each year, beginning with October 1, 1940, such rental to be paid to the Referee and to be used for the payment of taxes and upkeep on the property, and the balance to be distributed among secured and unsecured creditors as may be hereafter ordered.

It Is Further Ordered that the property covered by mortgages, liens, pledges or encumbrances shall be subject to the payment of the claims of secured creditors as their interests may appear.

It Is Further Ordered that all matters of sale of unexempt perishable property or unexempt per-

sonal property not [19] reasonably necessary for the farming operations of the bankrupt, or payments to be made on the principal due and owing to any secured or unsecured creditors in addition to the rental above fixed, and other matters provided for in said Section 75 (s) not herein passed upon, are reserved for the further consideration and order of the Court.

It Is Further Ordered that all judicial or official proceedings in any court or under the direction of any official against the bankrupt or his property be stayed for a period of three (3) years, or until the further order of the Court.

It Is Further Ordered that the bankrupt be and he is hereby authorized and instructed to sell from time to time as deemed advisable by him, certain of the weaner pigs now in his possession as shown by his Second Report filed herein on the 5th day of February, 1940, for the purpose of paying to the Mountain Finance Company the balance due on the 1935 Oldsmobile sedan being purchased by the bankrupt.

The foregoing Order, and each and every part thereof, is expressly conditioned upon the confirmation and approval of the Hon. Frank H. Norcross, Judge of the above entitled Court.

/s/ JAMES L. HASH

Referee in Bankruptcy and
Conciliation Commissioner.

The foregoing Order is hereby ratified, approved and confirmed, this 25th day of March, 1940.

/s/ FRANK H. NORCROSS

U. S. District Judge. [20]

Painter, Withers & Edwards

Attorneys at Law

153 North Virginia Street

Reno, Nevada

Memo to Mr. James L. Hash:

This order is based upon and meticulously follows Form No. 533 as shown in the 1939 supplement to Remington on Bankruptcy, Volume 9.

Mr. Remington indicates that the entire order should be signed by the Referee and that the consent of the District Court is not necessary. However, reading Section (s) of the Bankruptcy Act itself, indicates that there is some question as to whether or not the order should be entered by the District Judge. I have consequently conditioned the order upon its approval by Judge Norcross, so that there will be no question as to its validity, or that you have exceeded your authority.

Very truly yours,

T. L. WITHERS

TLW:f

[Endorsed]: Filed Mar. 25, 1940. [21]

[Title of District Court and Cause.]

PETITION AND MOTION

Your petitioner, the Federal Farm Mortgage Corporation, a corporation, respectfully represents to this Honorable Court:

I.

That the Federal Farm Mortgage Corporation is now and at all times hereinafter mentioned has been a corporation organized and existing under and by virtue of the laws of the United States of America.

II.

That on or about the 3rd day of September, 1935, Henry A. Paulsen and Viola S. Paulsen, also known as Viola Paulsen, his wife, made, executed, and delivered to the Land Bank Commissioner a promissory note in the principal amount of \$5,500.00, secured by a deed of trust on certain real property situate in the County of Churchill, State of Nevada, more particularly described as follows:

The Northwest quarter of Section 12, Township 19 North, Range 30 East, Mount Diablo Base and Meridian; containing 160 acres, more or less,

that said deed of trust was duly executed, acknowledged and certified so as to entitled it to be recorded, and was, on September 28, 1935, recorded in Book 15 of Mortgages, at page 55, in the office of the County Recorder of Churchill [22] County, Nevada; that said deed of trust is a first lien on the

property described therein; that due to defaults under the terms of said note and deed of trust, said deed of trust was called for foreclosure on March 24, 1938; that the total delinquent indebtedness under said note and deed of trust, as of March 29, 1943, is the sum of \$7,801.79.

III.

That through an Act of Congress, the Federal Farm Mortgage Corporation has succeeded to the interest of the Land Bank Commissioner and is now the owner and holder of the note and deed of trust described in Paragraph II hereof.

IV.

That The Federal Land Bank of Berkeley is the agent and attorney-in-fact for the Federal Farm Mortgage Corporation.

V.

That on or about the 6th day of March, 1939, Henry Andrew Paulsen filed a petition, praying that he be afforded an opportunity to effect a composition or extension of time to pay his debts under Section 75 of the Bankruptcy Act; that the first meeting of creditors was held on the 5th day of April, 1939, before James L. Hash, Conciliation Commissioner.

VI.

That the debtor failed to effect a composition or extension with his creditors, and on or about the first day of May, 1939, was adjudicated a bankrupt under Section 75 (s) of the Bankruptcy Act; that

the first meeting of his creditors was held before the Referee on the 28th day of June, 1939.

VII.

That on or about the 25th day of March, 1940, James L. Hash, Referee in Bankruptcy and Conciliation Commissioner, made and entered an order staying proceedings for three years and fixing the rental as follows:

“It is further ordered that, as provided in said Section 75, Subsection (s) of the Bankruptcy Act, the bankrupt pay rental in the sum of Five Hundred Fifty Dollars (\$550.00) to be paid annually on or before the first day of October of each year, beginning with October 1, 1940, such rental to be paid to the Referee and to be used for the payment of taxes and upkeep on the property, and the balance to be distributed among secured and unsecured creditors as may be hereafter ordered.” [23]

VIII.

That the three-year stay of proceedings, as provided in the order of March 25, 1940, signed by James L. Hash, Referee in Bankruptcy and Conciliation Commissioner, terminated on March 25, 1943; that the bankrupt failed to pay the appraised value into Court during the three-year stay or at the end thereof; that the bankrupt failed to ask for a reappraisal of his property during the three-year stay or at the end thereof; that the time for the liquidation of the bankrupt's estate under the provisions of the general bankruptcy law has now arrived.

Wherefore, petitioner prays and moves:

(1) That, at a time and place to be fixed by the Court, a general meeting of creditors of the above named bankrupt be held and that at least a ten-day notice thereof be given to the creditors listed in the bankrupt's schedules by mail to their respective addresses as they appear in the list of creditors of the bankrupt or as filed with the papers herein by the creditors.

(2) That an order to show cause be issued herein, requiring the bankrupt to appear at the time and place designated by the Court for said meeting of creditors to show cause, if any he has, why this Court should not order the appointment of a trustee,

(3) That, if it thereupon appears to this Court that the appointment of a trustee is proper, that this Court order the appointment of a trustee to sell or otherwise dispose of the property of the estate as provided for in the National Bankruptcy Act, and

(4) For such other, further or different relief as to this Court may seem meet and proper in the premises.

Dated this 29th day of March, 1943.

PERCY A. SMITH

Attorney for the Federal
Farm Mortgage Corporation
Address: 2180 Milvia Street
Berkeley, California. [24]

State of California

County of Alameda—ss.

Wm. H. Woolf, being first duly sworn, deposes and says:

That he is the Assistant Vice President of The Federal Land Bank of Berkeley, attorney-in-fact for the Federal Farm Mortgage Corporation, the petitioner named in the foregoing petition, and is duly authorized to make this affidavit on its behalf, and that the statements contained in said petition are true according to the best of his knowledge, information and belief.

WM. H. WOOLF

Subscribed and sworn to before me, this 31st day of March, 1943.

[Seal]

B. W. JACKSON

Notary Public in and for said
County and State.

My commission expires: October 17, 1944.

[Endorsed]: Filed Sept. 22, 1944. [25]

[Title of District Court and Cause.]

PETITION FOR REAPPRAISAL

Comes now Henry Andrew Paulsen, above named bankrupt, and respectfully says:

I.

That he was on the 1st day of May, 1939 duly adjudged a bankrupt under Section 75 (s) of the

National Bankruptcy Act and that on or about the 25th day of March, 1940 a three year stay of proceedings was duly ordered by James L. Hash, Conciliation Commission, acting as Referee.

II.

That during said three years stay of proceedings your petitioner was ordered to pay the sum of Five Hundred Fifty (\$550.00) Dollars per year as the reasonable rental value of said property and during said period your petitioner has made all of said payments and has complied with each and every order of the Conciliation Commissioner. [26]

Wherefore your petitioner prays that in accordance with Section 75 (s) of the National Bankruptcy Act, as interpreted by the United States Supreme Court [27] in the case of Wright v. Union Central Insurance Company, 85 Law Ed. 184, that said property be revalued or reappraised and that your petitioner be given the opportunity of purchasing the same upon the payment of said reappraised value less credits for payments heretofore made by your petitioner to the Conciliation Commission as herein above set forth.

Dated: This 2nd day of August, 1943. .

HENRY ANDREW PAULSEN

Petitioner

State of Nevada

County of Churchill—ss.

I, Henry Andrew Paulsen, the petitioning debtor

mentioned and described in the foregoing, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information and belief.

HENRY ANDREW PAULSEN

Subscribed and sworn to before me this 2nd day of August, 1943.

[Notarial Seal] ELI CANN

Notary Public in and for the County of Churchill,
State of Nevada.

[Endorsed]: Filed Sept. 22, 1944 [28]

[Title of District Court and Cause.]

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER

This matter coming on regularly to be heard on the 27th day of April, 1943, at the hour of 10:00 o'clock A.M., before the undersigned James L. Hash, on the petition and motion of the Federal Farm Mortgage Corporation dated March 29, 1943, and upon the order to show cause issued out of this Court pursuant thereto, and upon notice of meeting of creditors dated April 14, 1943, and Percy A. Smith appearing for the Federal Farm Mortgage Corporation, and Henry Andrew Paulsen and Viola S. Paulsen appearing in person and by their attorney, T. L. Withers, and no other creditors appearing, the matter was proceeded with, and the Court having seen and heard the evidence pro-

duced in support of said petition and motion, and it appearing to the Court, the Court finds that due and proper service of said order to show cause and petition was made on the bankrupt, and that notice of meeting of creditors was on the date thereof mailed to each of the creditors listed in the bankrupt's schedules on file herein, and to all other creditors who have appeared herein, and being fully advised, the Court finds the following facts to be true:

I.

That on or about the 6th day of March, 1939, Henry Andrew Paulsen filed [45] his petition praying that he be afforded an opportunity to effect a composition or extension of time to pay his debts under Section 75 of the National Bankruptcy Act.

II.

That the debtor failed to effect a composition or extension with his creditors, and on or about the first day of May, 1939, was duly adjudicated a bankrupt under Section 75 (s) of the National Bankruptcy Act.

III.

That the said bankrupt was at and before the filing of his petition justly and truly indebted to petitioner, the Federal Farm Mortgage Corporation; that said indebtedness is evidenced by a promissory note, secured by a deed of trust executed by Henry A. Paulsen and Viola S. Paulsen, also known as Viola Paulsen, his wife, in favor of the

Land Bank Commissioner, dated September 3, 1935, and recorded on September 28, 1935, in Book 15 of Mortgages, at page 55, in the office of the County Recorder of Churchill County, Nevada; that said deed of trust covers the following described real property in the County of Churchill, State of Nevada, to-wit:

The Northwest quarter of Section 12, Township 19 North, Range 30 East, Mount Diablo Base and Meridian; containing 160 acres, more or less.

IV.

That on or about the 25th day of March, 1940, a three-year stay of proceedings under Section 75 (s) was signed by James L. Hash, Conciliation Commission acting as Referee; that said three-year stay terminated on March 25, 1943; that the moratorium provided in Section 75 (s) has expired; that the bankrupt failed to pay the appraised value into Court during the three-year stay or at the end thereof; that the bankrupt failed to ask for a reappraisal of his property during the three-year stay; that the time for liquidation of the bankrupt's estate under the provisions of the National Bankruptcy Act has now arrived.

CONCLUSIONS OF LAW

As conclusions of law from the foregoing findings of fact, this Court [46] concludes that it should now order the appointment of a trustee

in accordance with the provisions of Section 75 (s) (3) of the National Bankruptcy Act, and that said trustee, upon qualifying, shall proceed to sell or otherwise dispose of the property hereinabove described, in accordance with the provisions of the National Bankruptcy Act.

Wherefore, by reason of the aforesaid findings of fact and conclusions of law, It Is Ordered that George W. Forbes be and he is hereby appointed trustee herein, and his bond is hereby fixed in the sum of \$2,500;

It Is Further Ordered that upon qualification of said trustee, or any other person who may hereafter be appointed trustee should the said George W. Forbes fail to qualify, he shall proceed at once to sell or otherwise dispose of the property hereinabove described, in accordance with the provisions of the National Bankruptcy Act.

Dated this 22 day of December, 1943.

(s) JAMES L. HASH

Conciliation Commissioner,
acting as Referee.

[Endorsed]: Filed Sept. 20, 1944. [47]

[Title of District Court and Cause.]

ORDER GRANTING PETITION

The order directing the bankrupt to appear before the undersigned and show cause why the trustee

should not abandon certain real property as burdensome to the estate, came on regularly for hearing pursuant to due and legal notice thereof, on the 16th day of March, 1944, in room No. 14, Washoe County Library Building, Reno, Nevada. The trustee, George W. Forbes, appeared in person; the bankrupt, Henry Andrew Paulsen, appeared by his attorneys, Messrs. Withers and Edwards; the Federal Farm Mortgage Corporation appeared by its attorney, Percy A. Smith, and the I. H. Kent Co. appeared by its attorneys, Messrs. Withers and Edwards.

Objection to the hearing of said show cause order was made by the bankrupt upon the ground that the bankrupt had heretofore, and on the 23rd day of September, 1943, filed a petition for reappraisal, and that said petition had not been passed upon, and that until said petition was heard the trustee should not be permitted to disclaim said property.

Upon stipulation of Percy A. Smith and Messrs. Withers and Edwards, it was agreed that this petition be worthwith heard and passed upon by the Referee. The Referee having considered the arguments presented, and the records in the case, It Is Hereby Ordered:

1. That the bankrupt's petition for a reappraisal be granted.

2. That the bankrupt, Henry Andrew Paulsen, designate one appraiser; that the Federal Farm Mortgage Corporation, a secured creditor, designate a second appraiser; and that the two apprais-

ers so designated appoint a third appraiser, [48] and that said appraisers forthwith reappraise said property for the purpose of ascertaining the actual value thereof at the present time.

3. That the hearing on the show cause order be continued pending further notice thereof.

Dated: This 16th day of March, 1944.

(Sgd.) JAMES L. HASH

Conciliation Commissioner
and Referee in Bankruptcy.

[Endorsed]: Filed Sept. 20, 1944. [49]

[Title of District Court and Cause.]

PETITION FOR REVIEW BY JUDGE

To the Honorable Conciliation Commissioner-Referee and the Judge of the Above Entitled Court:

The petition of the Federal Farm Mortgage Corporation respectfully represents that petitioner is aggrieved by the order of James L. Hash, Conciliation Commissioner-Referee, dated March 16, 1944, which orders that the property of the above named bankrupt be reappraised; that a copy of said order is attached hereto as Exhibit "A" and by this reference made a part hereof; that exception is taken to the above named order on the following grounds:

I.

That the Federal Farm Mortgage Corporation is now and at all times herein mentioned has been a corporation organized and existing under and by virtue of the laws of the United States of America;

II.

That on or about the 3rd day of September, 1935, Henry A. Paulsen and Viola S. Paulsen, also known as Viola Paulsen, his wife, made, executed and delivered to the Land Bank Commissioner a promissory note in the principal amount of \$5500.00, secured by a deed of trust on certain real property situate [50] in the County of Churchill, State of Nevada, more particularly described as follows:

The Northwest quarter of Section 12, Township 19 North; Range 30 East, Mount Diablo Base and Meridian; containing 160 acres, more or less,

which said deed of trust was duly executed, acknowledged and certified so as to entitle it to be recorded, and was on September 28, 1935, recorded in Book 15 of Mortgages at page 55, in the office of the County Recorder of Churchill County, Nevada; that said deed of trust is a first lien on the property described therein; that due to defaults under the terms of said note and deed of trust, said deed of trust was called for foreclosure on March 24, 1938;

III.

That through an Act of Congress the Federal Farm Mortgage Corporation has succeeded to the interest of the Land Bank Commissioner and is now the owner and holder of the note and deed of trust described in paragraph II hereof;

IV.

That the Federal Land Bank of Berkeley is the agent and attorney in fact of the Federal Farm Mortgage Corporation;

V.

That on or about the 6th day of March, 1939, Henry Andrew Paulsen filed a petition praying that he be afforded an opportunity to effect a composition or extension of time to pay his debts under Section 75 of the Bankruptcy Act; that the first meeting of creditors was on the 5th day of April, 1939, before James L. Hash, Conciliation Commissioner;

VI.

That the debtor failed to effect a composition or extension with his creditors and on or about the 1st day of May, 1939, was adjudicated a bankrupt under Section 75(s) of the [51] Bankruptcy Act; that the first meeting of his creditors was held before the Conciliation Commissioner-Referee on the 28th day of June, 1939;

VII.

That on the 25th day of March, 1940, a three year stay of proceedings under Section 75(s) was

signed by James L. Hash, Conciliation Commissioner acting as Referee; that said three-year stay terminated on the 25th day of March, 1943; that the moratorium provided by Section 75(s) has expired; that the bankrupt failed to pay the appraised value into court during the three-year stay, or at the end thereof; that the bankrupt failed to ask for reappraisal of his property during the three-year stay of proceedings;

VIII.

That on or about the 2nd day of April, 1943 and after the expiration of the three-year stay of proceedings, your petitioner filed with James L. Hash, Conciliation Commissioner acting as Referee, a petition and motion requesting the appointment of a trustee to sell or otherwise dispose of the property of the above named bankrupt's estate as provided for in the National Bankruptcy Act;

IX.

That on the 27th day of April, 1943, pursuant to notice duly and regularly given, a hearing was held before James L. Hash, Conciliation Commissioner acting as Referee, on the petition and motion for the appointment of a trustee; that at said hearing the bankrupt appeared in person and by his attorney; that at the conclusion of said hearing the Conciliation Commissioner-Referee determined that a trustee should be appointed; that on the 22nd day of December, 1943, the said James L. Hash, Con-

ciliation Commissioner-Referee made and entered his findings of fact and conclusions of law and order [52] appointing George W. Forbes trustee of the above entitled estate, and directing said trustee to proceed at once to sell or otherwise dispose of the property hereinabove described, in accordance with the provisions of the Bankruptcy Act;

X.

That on or about the 23rd day of September, 1943, five months and twenty-nine days after the expiration of the three-year stay of proceedings, and subsequent to the filing of the petition for the appointment of a trustee hereinabove referred to, the above named bankrupt filed a petition with **James L. Hash**, Conciliation Commissioner acting as Referee, requesting that an appraiser or appraisers be appointed for the purpose of making a reappraisal of the real property hereinabove described, together with the improvements thereon;

XI.

That on the 16th day of March, 1944, a hearing was duly and regularly held before the Conciliation Commissioner-Referee on the report and petition filed herein by the said George W. Forbes, Trustee; that at said hearing it was determined that the petition for reappraisal filed herein on September 23, 1943 by the bankrupt should first be heard and determined by the Conciliation Commissioner-Referee;

XII.

That on or about the 24th day of March, 1944, James L. Hash, acting as Referee, signed an order that the property of said bankrupt be reappraised and that the hearing on the report and petition of the trustee be continued pending further notice; that said order granting the bankrupt's petition for reappraisal is dated March 16, 1944, but was not signed by the said Conciliation Commissioner acting as Referee, until March 24, 1944;

XIII.

That Sec. 39c of the Bankruptcy Act provides that "A person aggrieved by an order of a referee may, within ten days after the entry thereof, or within such extended time as the court may for cause shown allow, file with the referee a petition for review of such order by a judge." That more than ten days has not elapsed since March 24, 1944, the date on which said order dated March 16, 1944 was entered.

ERRORS BY WHICH PETITIONER IS
AGGRIEVED

The Conciliation Commissioner-Referee erred in ordering that the property of said bankrupt be reappraised for the reason that said request and petition for reappraisal was not filed by the bankrupt until after the three-year stay of proceedings had expired.

Wherefore, petitioner on review prays that the

Conciliation Commissioner-Referee forthwith certify to the judge of the above entitled court the question here presented and that said order dated March 16, 1944, be reviewed by the judge of the above entitled court and that said judge make his order,

1. Denying the bankrupt's petition and request for reappraisal of the real property hereinabove described,

2. Directing the Conciliation Commissioner-Referee to proceed with the liquidation of the bankrupt's estate as provided by law, and

3. For such other and further relief as to the court may seem just and proper.

Dated this 1st day of April, 1944.

/s/ PERCY A. SMITH

Attorney for the Federal
Farm Mortgage Corpora-
tion,

Address: 2180 Mlivia
Street, Berkeley, Cali-
fornia.

(Affidavit of Service by Mail attached to original)

[Endorsed]: Filed May 5, 1944 [54]

[Title of District Court and Cause.]

CERTIFICATE OF CONCILIATION COM-
MISSIONER - REFEREE ON PETITION
FOR REVIEW BY JUDGE

I, James L. Hash, Conciliation Commissioner-Referee of the above entitled court, do hereby transmit the following certificate on the petition for review filed herein by the Federal Farm Mortgage Corporation on the 3rd day of April, 1944, together with a statement of the question presented, the order entered herein and the petition for review, and I hereby certify:

I.

That Henry Andrew Paulsen is the owner of certain real property in the County of Churchill, State of Nevada, which said real property is subject to the lien of the deed of trust securing a promissory note, which said deed of trust and promissory note are now held and owned by the Federal Farm Mortgage Corporation;

II.

That on the 6th day of March, 1939, Henry Andrew Paulsen filed a petition praying that he be afforded an opportunity to effect a composition or extension of time to pay his debts under Section 75 of the Bankruptcy Act; that on April 12, 1939, the Federal Farm Mortgage Corporation filed its rejection of the debtor's offer to a composition or extension, and that said creditor was the only creditor objecting thereto; that as the result

of said objection the debtor was unable to effect a composition with his creditors and was, on or about the 1st day of May, 1939, adjudicated a [55] bankrupt under Section 75(s) of the National Bankruptcy Act.

III.

That on the 25th day of March, 1940, a three-year stay of proceedings under Section 75(s) was signed by the undersigned James L. Hash, Conciliation Commissioner acting as Referee; that during said three-year stay of proceedings, the bankrupt paid into court annual rental in the sum of Five Hundred and Fifty (\$550.00) Dollars, pursuant to the Order of the Referee contained in said order staying proceedings, and fully complied with said order; that the three-year stay of proceedings terminated on the 25th day of March, 1943; that the bankrupt failed to pay the appraised value into Court during the three-year stay; that the bankrupt failed to ask for a reappraisal of his property during the three-year stay of proceedings, although, on March 24, 1943, the said debtor wrote a letter to said Federal Farm Mortgage Corporation for the purpose of attempting to settle the mortgage claim of said Federal Farm Mortgage Corporation, and thereafter there was correspondence between the debtor through his attorneys, Messrs. Withers and Edwards, the Conciliation Commissioner, and said Federal Farm Mortgage Corporation and its various representatives, all of which correspondence is set forth in full in the debtor's petition for re-

appraisal filed on or about August 2, 1943, a copy of which is hereto attached;

IV.

That on the 2nd day of April, 1943, the Federal Farm Mortgage Corporation filed with James L. Hash, Conciliation Commissioner-Referee, a petition and motion requesting the appointment of a trustee to sell or otherwise dispose of the above named bankrupt's estate in accordance with the provisions of the National Bankruptcy Act; [56]

V.

That on or about the 23rd day of September, 1943, subsequent to the expiration of the three-year stay of proceedings, the above named bankrupt filed a petition with James L. Hash, Conciliation Commissioner-Referee, requesting that an appraiser or appraisers be appointed for the purpose of making a reappraisal of the bankrupt's real property, together with the improvements thereon;

VI.

That on or about the 24th day of March, 1944, James L. Hash, Conciliation Commissioner-Referee, signed an order dated March 16, 1944, granting the bankrupt's request that the real property of the bankrupt, together with the improvements thereon, be reappraised; that a copy of said order is attached hereto;

VII.

That on the 3rd day of April, 1944, the Federal Farm Mortgage Corporation filed herein its peti-

tion for review in which it is alleged that the Conciliation Commissioner-Referee erred in ordering that the property of the bankrupt be reappraised for the reason that the request and petition for reappraisal was not filed by the bankrupt until after the three-year stay of proceedings had expired; that a copy of said petition for review is hereto attached.

The Questions Hereby Certified to the Judge of This Court Are

1. If a bankrupt fails to pay the appraised value into Court and fails to request a reappraisal within three years and a secured creditor requests the appointment of a trustee under the provisions of the last sentence of Section 75(s)(3), can the bankrupt thereafter secure a reappraisal with the right [57] redeem under the first proviso under Section 75(s) (3)?

2. Whether under the circumstances in this case, as set forth by the correspondence attached to the debtor's petition for reappraisal, the Federal Farm Mortgage Corporation is estopped to deny that the bankrupt is entitled to a reappraisal of said property?

Dated this 2 day of May, 1944.

/s/ JAMES L. HASH

Conciliation Commissioner-
Referee

[Endorsed]: Filed May 5, 1944. [58]

In the District Court of the United States of
America, in and for the District of Nevada

No. A-33-A

In Bankruptcy Sec. 75 (s)

In the Matter of

HENRY ANDREW PAULSEN,

Bankrupt.

DECISION

REVIEW OF ORDER OF CONCILIATION COMMISSIONER AND REFEREE IN BANKRUPTCY GRANTING BANK- RUPT'S PETITION FOR REAPPRAISAL

Norcross, District Judge.

The matter here presented is a Petition on behalf of the Federal Farm Mortgage Corporation to review an order made March 16, 1944, by the Conciliation Commissioner-Referee in Bankruptcy, granting the petition of the Bankrupt for a re-appraisal of his farm property which is subject to a deed of trust held by Petitioner herein, to secure the principal amount of \$5500.00, with accrued interest, which deed of trust was called for foreclosure March 24, 1938.

On March 25, 1940, Bankrupt was granted a three year stay of proceedings under Section 75(s) of the Bankruptcy Act. The property was appraised for the sum of \$3000.00. The Bankrupt failed to pay the said appraised value during the three year stay or at the end thereof. The order granting the three year extention was subject to the bankrupt paying into Court an annual rental in

the sum of \$550.00 per year which amount was so annually paid.

The questions of law certified to the Judge of this Court for review are: [59]

“1. If a bankrupt fails to pay the appraised value into Court and fails to request a reappraisal within three years and a secured creditor requests the appointment of a trustee under the provisions of the last sentence of Section 75(s) (3), can the bankrupt thereafter secure a reappraisal with the right to redeem under the first proviso under Section 75(s) (3)?”

“2. Whether under the circumstances in this case, as set forth by the correspondence attached to the debtor's petition for reappraisal, the Federal Farm Mortgage Corporation is estopped to deny that the bankrupt is entitled to a reappraisal of said property?”

The evidence before the Conciliation Commissioner-Referee, also, discloses that during the entire time following the date of granting the three year stay of proceedings the Bankrupt was diligent in efforts to improve the property and the property was so improved. The evidence, also, discloses that Bankrupt is the owner of other property, particularly livestock, which is not subject to the deed of trust, and that he has other unsecured creditors. Bankrupt and his unsecured creditors clearly have an interest in the question of the value at which the real property might now be appraised. On the part

of the Federal Farm Mortgage Corporation it is admitted that if Bankrupt had paid into Court the appraised value of \$3000.00, during the three year stay of proceedings that it would then have petitioned for a re-appraisal upon the ground the appraisal was below the real value.

The answers to questions certified are: 1. Yes.
2. No.

Dated this 21st day of August, 1944.

/s/ FRANK H. NORCROSS

District Judge.

[Endorsed]: Filed Aug. 21, 1944. [60]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the Federal Farm Mortgage Corporation, a corporation, hereby appeals to the United States Circuit Court of Appeals from the decision of the above entitled court made and entered herein on the 21st day of August, 1944, holding that the above named bankrupt is entitled to secure a reappraisal with the right to redeem under the first proviso of Section 75(s)(3).

Dated this 30th day of August, 1944.

PERCY A. SMITH

Attorney for the Federal Farm
Mortgage Corporation.

2180 Milvia Street

Berkeley, California. [64]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK,
U. S. DISTRICT COURT

United States of America,
District of Nevada—ss.

I, O. E. Benham, Clerk of the District Court of the United States for the District of Nevada, do hereby certify that I am custodian of the records, papers and files of the said United States District Court for the District of Nevada, including the records, papers and files in the Matter of Henry Andrew Paulsen, said case being No. A-33-A on the bankruptcy docket of said Court.

I further certify that the attached transcript, consisting of 69 typewritten pages numbered from 1 to 69, inclusive, contains a full, true and correct transcript of the proceedings in said case and of all papers filed therein, together with the endorsements of filing thereon, as set forth in appellant's Designation of Record, and appellee's Designation of Additional Portions of Record, both filed in said case and made a part of the transcript attached hereto, as the same appear from the originals of record and on file in my office as such Clerk in Carson City, State and District aforesaid.

Witness my hand and the seal of said United States District Court this 5th day of October, 1944.

[Seal]

O. E. BENHAM

Clerk, U. S. District Court.

[Endorsed]: No. 10886. United States Circuit Court of Appeals for the Ninth Circuit. Federal Farm Mortgage Corporation, a corporation, Appellant, vs. Henry Andrew Paulsen, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Nevada.

Filed October 6, 1944.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10886

FEDERAL FARM MORTGAGE CORPORA-
TION, a corporation,

Appellant,

vs.

HENRY ANDREW PAULSEN,

Appellee.

STATEMENT OF POINTS ON APPEAL AND
DESIGNATION OF RECORD

Statement of Point on Appeal

Comes now the Federal Farm Mortgage Corporation, appellant herein, and makes the following statement of the point on which it intends to rely

upon the appeal in the above entitled cause for the reversal of the decision and order appealed from, to-wit:

1. The appellee, who failed to pay the original appraised value into Court during the three-year stay and failed to request a reappraisal until six months after the expiration of the three-year stay and only after the secured creditors petitioned for the appointment of a trustee under the provisions of the last sentence of Section 75(s)(3) of the National Bankruptcy Act, is not legally entitled to have his property reappraised and to redeem under the first proviso of Section 75(s)(3) of the National Bankruptcy Act.

Designation of Record Necessary for Consideration of the Foregoing Point

1. Petition in proceedings under Section 75(a-r) of the National Bankruptcy Act filed March 6, 1939.
2. Order of Adjudication and General Reference under Section 75(s) dated May 1, 1939.
3. Order Approving Appraisal, Setting Off Exemptions, and Staying Proceedings dated March 25, 1940.
4. Petition and Motion of the Federal Farm Mortgage Corporation dated March 29, 1943.
5. Petition for Reappraisal dated August 2, 1943. Include only paragraphs numbered I and II and the prayer of this petition; omit all exhibits.
6. Findings of Fact, Conclusions of Law and Order Appointing Trustee dated December 22, 1943.
7. Order Granting Petition for Reappraisal dated March 16, 1944.

8. Petition for Review by Judge dated April 1, 1944. Omit all exhibits.

9. Certificate of Conciliation Commissioner-Referee Upon Petition for Review by Judge filed May 5, 1944. Omit Order Granting Petition for Reappraisal and all exhibits.

10. Memorandum, Opinion and Order of Judge dated August 21, 1944.

11. Notice of Appeal.

Dated this 26th day of September, 1944.

RICHARD W. YOUNG

M. G. HOFFMANN

PERCY A. SMITH

Attorneys for the Federal
Farm Mortgage Corporation
Address: 2180 Milvia Street
Berkeley, California

[Title of District Court and Cause.]

AFFIDAVIT OF MAILING

State of California

County of Alameda—ss.

Z. Tretheway, of said County of Alameda, State of California, being first duly sworn, deposes and says: I am over the age of eighteen and am not a party to the above entitled matter; that on the 26th day of September, 1944, I served a copy of Statement of Points on Appeal and Designation of Record in the above entitled matter, dated September 26, 1944, and signed by Richard W. Young, M. G.

Hoffmann and Percy A. Smith, Attorneys for the Federal Farm Mortgage Corporation, on the following persons, to-wit:

Withers and Edwards
Attorneys at Law
153 North Virginia Street
Reno, Nevada

by enclosing a copy of the same in a sealed envelope, which envelope was addressed to said persons at the address given, and depositing the same, with postage fully prepaid, in the United States Post Office at Berkeley, California, on said date; that at the time of making said deposit there was a regular communication by the United States mails between the post office of deposit thereof, as aforesaid, and the place of address, as aforesaid; that at the time of making said deposit the attorneys for appellant, the Federal Farm Mortgage Corporation, had their offices in Berkeley, California, and resided in Berkeley, California.

Z. TRETHEWAY

Subscribed and sworn to before me this 26th day of September, 1944.

[Seal]

N. HOPKINS

Notary Public in and for
said County and State.

My commission will expire April 1, 1947.

[Endorsed]: Filed Oct. 6, 1944.

No. 10886

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FEDERAL FARM MORTGAGE CORPORATION,
a corporation, APPELLANT,

vs.

HENRY ANDREW PAULSEN, APPELLEE.

APPELLANT'S BRIEF

RICHARD W. YOUNG,
M. G. HOFFMANN,
PERCY A. SMITH,
Attorneys for Appellees.

FILED

JUN 14 1935

PAUL P. O'BRIEN,
CLERK



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No. 10886

IN THE

United States Circuit Court of Appeals

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vs.

HENRY ANDREW PAULSEN, APPELLEE.

APPELLANT'S BRIEF

JURISDICTION

This appeal is from a decision of the Honorable Frank H. Norcross, Judge of the United States District Court in and for the District of Nevada.

(a) The District Court had original jurisdiction of the bankrupt and the subject matter under Section 75 (a-s) of the National Bankruptcy Act. (Title 11, U.S.C. Section 203 (a-s).

(b) The District Judge had jurisdiction on appellant's Petition for Review, under Section 39 (c) and Section 2 (10) of the National Bankruptcy Act. (Title 11, U.S.C., Sections 67 (c) and 11 (10).

(c) Appellant's Notice of Appeal to this Court was filed on or about August 31, 1944. (TR. 44)

(d) The jurisdiction of this Court is invoked under

Section 24 of the National Bankruptcy Act. (Title 11, U.S.C., Section 47.)

STATEMENT OF THE CASE

Appellant is a secured creditor with a first lien against appellee's real property.

On March 6, 1939, appellee filed his petition under Section 75 of the National Bankruptcy Act. (TR. 2) On May 1, 1939, appellee was adjudicated bankrupt under Section 75(s). (TR. 13)

Appellant's security was appraised at \$3,000.00, and on February 5, 1940, the referee made and entered an order approving the appraisal, setting aside exemptions, retaining the bankrupt in possession of appellant's security, staying proceedings for three years, and fixing rental. (TR. 14-18) On March 25, 1940, the referee's order was "ratified, approved and confirmed" by the District Judge. (TR. 19)

On or about April 2, 1943, appellant filed a Petition and Motion seeking the appointment of a trustee and the liquidation of the bankrupt's estate. (TR. 20-23)

On April 27, 1943, a hearing was held on appellant's Petition and Motion. The referee found that the three-year stay expired on March 25, 1943, "that the bankrupt failed to pay the appraised value into court during the three-year stay or at the end thereof; that the bankrupt failed to ask for a reappraisal of his property during the three-year stay; that the time for liquidation of the bankrupt's estate under the provisions of the National Bankruptcy Act has now arrived," (TR. 31-y) and concluded that a trustee should be appointed and the estate liquidated. It was so ordered. The decision was made at the time of the hearing, and the matter was not taken under submission. However, due to

the difficulty in finding someone who would serve as trustee, the Findings, Conclusions and Order were not signed by the referee until December 22, 1943. (TR. 31-z) On or about September 23, 1943, appellee filed a Petition for Reappraisal. (TR. 24-28) (See TR. 32 for date said petition was filed.)

On March 16, 1944, there was a duly noticed hearing on an order to show cause why the trustee should not abandon the subject property as burdensome. At that time it was agreed that appellee's Petition for Reappraisal might be heard and passed upon by the referee before he decided what action should be taken by the trustee. Thereupon the matter of reappraisal was heard, and the order dated March 16, 1944, was made by the referee granting appellee's Petition for Reappraisal. (TR. 32-32a) Said order was not signed by the referee until March 24, 1944.

On April 3, 1944, appellant filed a petition to review said order. (TR. 32-e—36) (See TR. 38 for date of filing said petition with the referee.)

On May 2, 1944, the referee signed a certificate on petition for review (TR. 38-41) in which he certified two questions to the District Judge, namely:

1. If a bankrupt fails to pay the appraised value into Court and fails to request a reappraisal within three years and a secured creditor requests the appointment of a trustee under the provisions of the last sentence of Section 75 (s) (3), can the bankrupt thereafter secure a reappraisal with the right to redeem under the first proviso under Section 75 (s) (3)?

2. Whether under the circumstances in this case, as set forth by the correspondence attached to the debtor's petition for reappraisal, the Federal Farm Mortgage Corporation is estopped to deny that the bankrupt is entitled to a reappraisal of said property?

On August 21, 1944, the District Judge decided Question No. 1 in the affirmative and Question No. 2 in the negative. (TR. 42-44)

On or about August 31, 1944, appellant filed a notice of appeal dated August 30, 1944, wherein it appealed from the District Judge's holding as to Question No. 1. (TR. 44) No appeal has been taken from the District Judge's holding as to Question No. 2. Therefore, on this appeal the sole question before this Court is whether the District Judge erred in deciding Question No. 1 in the affirmative.

STATEMENT OF POINTS ON APPEAL

Appellant's Statement of Points on Appeal contains a concrete statement of the question in the following language:

"The appellee, who failed to pay the original appraised value into Court during the three-year stay and failed to request a reappraisal until six months after the expiration of the three-year stay and only after the secured creditors petitioned for the appointment of a trustee under the provisions of the last sentence of Section 75(s) (3) of the National Bankruptcy Act, is not legally entitled to have his property reappraised and to redeem under the first proviso of Section 75(s) (3) of the National Bankruptcy Act."

DISTRICT JUDGE'S DECISION

The District Judge expressly found that "*The bankrupt failed to pay the said appraised value during the three-year stay or at the end thereof.*" This finding should certainly have been the basis for deciding Question No. 1 in the negative rather than in the affirmative. Apparently the District Judge decided the question as he did because, as stated by him, the "Bankrupt and his unsecured creditors clearly have an interest in the question of the value at which the real

property might now be appraised." The only explanation for such a conclusion is that the District Judge did not have the full purport of the question in mind. Evidently he had in mind the fact that a trustee had been appointed, and that, therefore, as in general bankruptcy, the value of the bankrupt's estate should be determined before a decision could be made regarding the sale or abandonment of an encumbered asset. Such an appraisal would, of course, not be made under the first proviso of Section 75(s) (3), nor would the fact that the bankrupt and his unsecured creditors may be interested in the value of the property, *for purposes of liquidation*, give the bankrupt the right to redeem under the first proviso of Section 75(s) (3) on a request for reappraisal made six months after the expiration of the three-year stay.

ARGUMENT

I

THE STATUTE PERTAINING TO REAPPRAISAL AND REDEMPTION DOES NOT CONTEMPLATE THAT THE REQUEST FOR REAPPRAISAL MAY BE MADE AFTER THE EXPIRATION OF THE THREE-YEAR STAY OR THAT A REDEMPTION MAY BE MADE THEREAFTER

Section 75(s) (3) reads in part as follows:

"At the end of three years, or prior thereto, the debtor may pay into court the amount of the appraisal of the property of which he retains possession, including the amount of encumbrances on his exemptions, up to the amount of the appraisal, less the amount paid on principal: *Provided*, That upon request of any secured or unsecured creditor, or upon the request of the debtor, the court shall cause a reappraisal of the debtor's property, or in its discretion set a date for hearing, and after such hearing, fix the value of the property, in accordance with the evidence submitted, and the debtor shall then pay the value so arrived at into court, less payments made on the principal, for distribution to all secured

and unsecured creditors, as their interests may appear, and thereupon the court shall, by an order, turn over full possession and title of said property, free and clear of encumbrances to the debtor."

The bankrupt contends, and the District Judge apparently agreed, that in enacting this emergency legislation and incorporating therein the extraordinary privileges just quoted, Congress did not intend to and did not place any limitation on the time within which such extraordinary privileges must be exercised by the bankrupt. On the other hand appellant contends that "*At the end of three years, or prior thereto*" is a definite and unambiguous three-year period of limitation, and that, unless the appraised value has been paid into court or a request for reappraisal has been made *on or before the last day* of the three-year stay, the bankrupt's extraordinary privileges are lost to him forever.

**(a) The Express Provisions of Section 75 Show That
Congress Intended the Rehabilitation Period
Would Be Three Years and No More**

Section 75(s) (2) reads in part as follows:

"When the conditions set forth in this section have been complied with, the court shall stay all judicial or official proceedings in any court, or under the direction of any official, against the debtor or any of his property, for a period of *three years*. *During such three years* the debtor shall be permitted to retain possession of all or any part of his property, . . . provided he pays a reasonable rental semiannually for that part of the property of which he retains possession."*

In this case the Conciliation Commissioner-Referee signed the stay order on February 5, 1940. (TR. 14) The District Judge "ratified, approved and confirmed" the order on March 25, 1940. (TR. 19) Since, according to the defini-

*Throughout brief all emphasis is added to quotations.

tion of "court," as given in Section 1 (9) of the Bankruptcy Act, it includes the judge *and the referee*, it is submitted that the stay order became effective on February 5, 1940, in which case the three-year stay expired on February 5, 1943. However, even if not effective until March 25, 1940, the injunction against "all judicial or official proceedings" automatically ceased on March 25, 1943. In *Hardt v. Kirkpatrick*, 91 F.(2d) 875, this Court held that, without the injunction imposed by the stay order, a sale under a deed of trust is proper. The United States Supreme Court had previously held in *Stratton v. New*, 51 S. Ct. 465, that mere adjudication without an injunction would not prevent the foreclosure of a valid mortgage. After the expiration of the injunction there could be no possible legal grounds upon which a re-appraisal could be granted and the procedure for redemption set in motion, as the extraordinary privileges had then fully expired, and the matter was under the jurisdiction of the court exactly as it would have been had an adjudication under a voluntary petition in general bankruptcy been entered on the day upon which the three-year stay expired. This statement is supported by Subsection (n), which reads in part as follows:

"In proceedings under this section, except as otherwise provided herein, the jurisdiction and powers of the courts, the title, powers and duties of its officers, the duties of the farmer, *and the rights and liabilities of creditors*, and of all persons with respect to the property of the farmer and the jurisdiction of the appellate courts, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the farmer's petition, asking to be adjudged a bankrupt, was filed with the clerk of court or left with the conciliation commissioner for the purpose of forwarding the same to the clerk of court."

In providing that: "At the end of three years, or prior thereto, the debtor may pay into court the amount of the

appraisal . . .” it is inconceivable that Congress referred to any “three years” other than the three years of the stay. And it was not intended that after the injunction became ineffective the bankrupt should still procure the exceptional benefits as against the “rights of creditors” referred to in Subsection (n).

Furthermore, it will be noted that, according to the statute, it is only “during such three years” that the debtor shall be permitted to retain possession of his property. Since his right to possession expressly terminates at the end of the three years, it would be wholly inconsistent with the purpose of the Act to hold that the extraordinary privilege of procuring a reappraisal and redeeming the property by paying the amount thereof into court could be exercised after the right of possession had expired.

It must also be noted that the right of possession is predicated upon the payment of rental for the property “of which he retains possession.” There is no question but that the Act would be unconstitutional if it did not provide for the payment of rental during the three-year stay. (See *Home Building and Loan Association v. Blaisdell*, 290 U. S. 398, 54 S. Ct. 231.) It is very evident then that the constitutionality could not be upheld if, six months or indefinitely after the expiration of the three-year stay and after the expiration of the right to possession and after the expiration of the duty to pay rental, the bankrupt might still take advantage of the extraordinary privileges here under consideration.

Apparently the bankrupt construes “At the end of three years” to mean “six months after the end of three years.” If a request for reappraisal can legally be granted six months after the end of three years, as contended by the bankrupt, there is no maximum stay period. If six months after the end of the three years comes within the purview of “At the end of three years, or prior thereto,” so would one year, or three

years, or five years, or a millennium. Webster defines "end" as follows:

"The extremity or conclusion of any event or series of events; a finality; *as, the end of a year*, or a discourse; also, the concluding events or part of a period or action."

The last sentence of Section 75 (s) (3) reads as follows:

"If, however, the debtor at any time fails to comply with the provisions of this section, or with any orders of the court made pursuant to this section, *or is unable to refinance himself within three years*, the court may order the appointment of a trustee, and order the property sold or otherwise disposed of as provided for in this title."

Here again the statute limits the bankrupt's right to three years, and, if he is "unable to refinance himself within three years," the estate may be liquidated. Section 75 (s) (6) reads as follows:

"This title is hereby declared to be an emergency measure and if in the judgment of the court such emergency ceases to exist in its locality, then the court, in its discretion, may shorten the stay or proceedings herein provided for and proceed to liquidate the estate."

The court "may *shorten* the stay of proceedings herein provided for and proceed to *liquidate* the estate." If the court should, under this subsection, shorten the stay to two years and "proceed to liquidate the estate," it seems certain that the bankrupt could not, several months later, procure a reappraisal and redeem at the reappraised value. Section 75 (s) provides for a maximum stay of three years, which may be *shortened* as provided in Section 75 (s) (6), but there is no provision whatsoever under which it may be *lengthened*.

(b) The United States Supreme Court Has Held That
the Stay May Be Three Years or Less But Has
Never Said It Can Be Extended

In *Wright v. Vinton Branch of Mountain Trust Bank*, 300 U. S. 440, 462; 112 A.L.R. 1455; 57 S. Ct. 556, in which the constitutionality of the second Frazier-Lemke Act was upheld, it was said:

"The claim that subsection (s) is unconstitutional rests mainly upon the contention that the Act denies to a mortgagee the 'right to determine when such sale shall be held, subject only to the discretion of the court.' The assertion is that the new Act in effect gives to the mortgagor the absolute right to a *three-year stay*; and that a three year moratorium cannot be justified. The *three-year stay* is specified in the following provisions:

" 'When the conditions set forth in this section (§75) have been complied with, the court shall stay all judicial or official proceedings in any court, or under the direction of any official, against the debtor or any of his property, for a period of *three years*.'

" '*At the end of three years, or prior thereto*, the debtor may pay into court the amount of the appraisal of the property of which he retains possession, including the amount of encumbrances on his exemptions, up to the amount of the appraisal, less the amount paid on principal.'

"Whether, in view of the emergency, an absolute stay of *three years* would have been justified under the bankruptcy power, we have no occasion to decide. There are other provisions in the statute affecting the mortgagor's right to possession. Their phraseology is lacking in clarity. But we are of opinion that, *while the Act affords the debtor, ordinarily, a three-year period of rehabilitation*, the stay provided for is not an absolute one; and that the court may *terminate* the stay and order a sale *earlier*. If we were in doubt as to the intention of Congress, we should still be led to that construction by

a well-settled rule: 'When *the validity* of an act of the Congress is drawn in question, and even if a serious doubt of *constitutionality* is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.' *Crowell v. Benson*, 285 U. S. 22, 62, 76 L.ed. 598, 619, 52 S. Ct. 285.

"The mortgagor's right to retain possession *during the stay* is specifically limited by Paragraph 3, which provides:

" 'If, however, the debtor at any time fails to comply with the provisions of this section, or with any orders of the court made pursuant to this section, *or is unable to refinance himself within three years*, the court may order the appointment of a trustee, and order the property sold or otherwise disposed of as provided for in this Act.'

"Thus, for example, *the debtor's tenure under the stay is subject to the requirement that he pay 'a reasonable rental semi-annually for that part of the property of which he retains possession.'* Under the last-quoted provision of Paragraph 3, *if the debtor defaults in this obligation 'at any time,'* the court may thereupon order the property sold. Likewise, the property while in the debtor's possession is kept, according to paragraph 2, at all times 'in the custody and under the supervision and control of the court;'

"Paragraph 3 also provides that 'if . . . the debtor at any time . . . is unable to refinance himself within three years,' the court may close the proceedings by selling the property. This clause must be interpreted as meaning that the court may terminate the stay if after a reasonable time it becomes evident that there is no reasonable hope that the debtor can rehabilitate himself *within the three-year period*. Finally, the intention of Congress to make the stay terminable by the court *within the three years* is shown also by Paragraph 6, which declares the Act an emergency measure, and provides that:

"If in the judgment of the court such emergency ceases to exist in its locality, then the court, in its discretion, may *shorten* the stay of proceedings herein provided for and proceed to liquidate the estate."

"Since the language of the Act is not free from doubt in the particulars mentioned, we are justified in seeking enlightenment from reports of Congressional committees and explanations given on the floor of the Senate and House by those in charge of the measure. When the legislative history** of the bill is thus surveyed, it becomes clear that to construe the Act otherwise than as giving the courts broad power to *curtail* the stay for the protection of the mortgagee would be inconsistent not only with the provisions of the Act, but with the committee reports and with the exposition of the bill made in both Houses by its authors and those in charge of the bill and accepted by the Congress without dissent. We construe it as giving the courts such power."

The bankrupt has relied upon *Wright v. Union Central Life Insurance Company*, 311 U. S. 273; 61 S. Ct. 196, 85 L.ed. 184, in support of his contention that he may redeem at any time before or after the end of three years. Said case was before the United States Supreme Court solely for the purpose of determining whether a secured creditor could prevent a redemption under the first proviso of Section 75(s) (3) by requesting and procuring a sale at public auction under the second proviso thereof. It was held that he could not. However, the request for reappraisal was made by Wright during the three years and not after the expiration thereof. He was adjudicated bankrupt under Section 75(s) on October 11, 1935. We do not know the date of the stay order, but under no circumstances could the three-year stay order have been made prior to adjudication, and, therefore, the stay could not have expired before October 11, 1938. The creditor filed a request for sale at public auction on July 22, 1938. The bankrupt requested a reappraisal on

**See infra for express "legislative history."

October 5, 1938, and, therefore, "prior" to the end of the three-year stay. Accordingly, the Wright case is no authority whatsoever for the contention that the reappraisal may be requested and redemption made *after* the three years. Construed most favorably to the bankrupt, the decision can not mean more than that, if the procedure for redemption is set in motion during or at the end of the three years, the bankrupt shall have a reasonable time after the value is fixed within which to pay the money into court.

In the instant case appellant had not requested a sale at public auction under the second proviso of Section 75 (s) (3), as had the creditor in the Wright case. Instead, the procedure set forth in the last sentence of Section 75 (s) (3) for liquidation due to the bankrupt's failure to refinance within three years had been followed. A general meeting of creditors had been noticed and held. The court had found and announced at the hearing that a trustee should be appointed. In the Wright case the creditors had not so proceeded, but, as stated by the court, the creditors nevertheless placed "great reliance on that part of Section 75, sub. s(3), which provides that if the debtor 'at any time fails to comply with the provisions of this section, or with any orders of the court made pursuant to this section, or is unable to refinance himself within three years, the court may order the appointment of a trustee, and order the property sold or otherwise disposed of as provided for in this title.' " The court then said:

"The power of the court to 'order the property sold or otherwise disposed of as provided for in this Act (title)' cannot be taken to mean a discretionary power to terminate the proceedings *through the exclusive device of a public sale*. Congress has provided that certain contumacious conduct on the part of the debtor *or his inability to refinance himself within three years may be an appropriate basis for a termination of the proceedings or for an acceleration thereof . . .* And to hold that the court has the discretion to deny *or to grant* the debtor's

right to redeem at the reappraised value or at the value fixed by the court, *dependent on general equitable considerations*, would be to rewrite the Act, so as to vest in the court a power which Congress did not plainly delegate. *This discretionary power of the court is exhausted when the court terminates the proceedings or accelerates their termination.* Such termination can be effected only pursuant to the precise procedure which Congress has provided."

The Supreme Court held that the power of the court to "order the property sold or otherwise disposed of as provided for in this Act" could not be taken to mean discretionary power to terminate the proceedings "*through the exclusive device of a public sale.*" This meant that the power to "order the property sold or otherwise disposed of as provided for in this Act" did not mean that the only discretionary power thus given to the court was to have the property sold at public auction under the second proviso, as had been requested by the Union Central Life Insurance Company. The Supreme Court recognized, however, that Congress had provided that the debtor's "inability to refinance himself within three years" was "an appropriate basis for a termination of the proceedings or for an acceleration thereof." In the instant case the bankrupt had failed to refinance himself within the three years, and, therefore, the express statutory basis, recognized by the Supreme Court, "for a termination of the proceedings" had arrived. For this reason appellant filed its petition for the appointment of a trustee and the liquidation of the bankrupt's estate, in accordance with the provisions of the last sentence of Section 75(s) (3). It will be noted that the Supreme Court held that the court does not have the discretion to deny or grant the debtor's right to redeem at the appraised value "*dependent on general equitable considerations*" and that "this discretionary power of the court is exhausted when the court terminates the proceedings." Thereby the Supreme Court held that the District Court *had* the discretion to deny or grant the debtor's right to re-

deem at the appraised value, *but not on general equitable considerations*, and also held that the "discretionary power of the court is exhausted when the court terminates the proceedings," and that "*such termination can be effected only pursuant to the precise procedure which Congress has provided.*"

In the instant case appellant followed the *precise* legal procedure, and the order granting the debtor the right to redeem after the three years had expired must have been based on "general equitable considerations" which not only exceeded the "discretionary power of the court" but was made after such discretionary power had been exhausted. The discretionary power had been exhausted because the court had ordered the appointment of a trustee and had ordered him to sell or otherwise dispose of the property. As previously shown, the appointment of the trustee was ordered by the referee at the hearing on appellant's petition therefor, which hearing was held on April 27, 1943, (TR. 31-w) although the order appointing the trustee and ordering him to sell or otherwise dispose of the property was not signed until December 22, 1943. (TR. 31-z) Nevertheless this order, from which there was no review or appeal and which therefore became final, had been in effect more than ninety days before the order granting the bankrupt's petition for re-appraisal was signed. (TR. 32-32-a) After the appointment and qualification of the trustee, and after he had petitioned the court for leave to abandon appellant's security, (see TR. 32 for reference to action of trustee) the extraordinary privileges under the first proviso of Section 75(s) (3) which might otherwise have been granted to the bankrupt had been exhausted. Certain excerpts heretofore quoted from the opinion of the United States Supreme Court in the Wright case make it clear that a bankrupt's extraordinary rights previously referred to are terminated when the stay is terminated.

A recent case, *In re Carter*, 56 Fed. Supp. 385, very carefully analyzed the decision in *Wright v. Union Central Life Insurance Company*, *supra*. It is clear from such analysis that the Wright case has in fact a very limited application.

- (c) The Committee Reports and the Exposition Made in Both Houses When the Present Section 75(s) Was Being Considered Clearly Show that Congress Intended to Limit the Redemption Period to Three Years

The following quotations are conclusive on this point:

Senator Frazier:

"We have left his security intact, but we have made it possible for the bankruptcy court to retain jurisdiction for a period *not to exceed three years*." 79 Cong. Rec. 13831.

Representative Andresen:

"All it does is to give a 3-year extension for the time of the redemption if the court so directs." 79 Cong. Rec. 14332.

Senator Borah:

"This bill is in reality a bankruptcy bill . . . After he has filed his petition to be declared a bankrupt, the property is taken in charge of by the court. *The courts may postpone action with reference to the ultimate disposition of the property for a period of three years*." 79 Cong. Rec. 13632.

Representative Lemke:

"All this bill does is to comply with the decision of the Supreme Court, giving the farmer an opportunity to get a breathing spell after he goes into bankruptcy."

"*The maximum time given him to pay the debt is 3 years*, but the district judge can cut it down to less than

3 years if he finds that the farmer is able to pay in less than that time. It is an emergency act. It is a conservation act.”

“There is nothing in this bill that the United States District Courts are not doing and have not already done under the Bankruptcy Act, except that this gives the farmer the same advantage that the small business man, corporations, and others that go into bankruptcy have—that is, to have his affairs liquidated in an orderly way. *If the farmer can borrow the money within 3 years to pay off what he owes, well and good*; but all of his property must go into the court.” 79 Cong. Rec. 14628.

II

REDEMPTION STATUTES ARE ALWAYS SELF-EXECUTING, AS IS THE RIGHT TO INITIATE REDEMPTION DURING THE THREE-YEAR STAY

The law is replete with redemption periods, such as from foreclosure, execution and tax sales, and with statutes of limitation. All are universally recognized as being self-executing and as completely extinguishing and terminating the redemptioner's rights upon their expiration. In other words, on the last day of the period the right exists but, on the following day, it is *gone forever*. The second proviso of Section 75(s) (3) provides that in case of a sale at public auction, the debtor shall have ninety *days* within which to redeem. There is as much reason to assume that this means ninety *years*, or an indefinite period, as there is to assume that Congress intended the redemption period under the fore part of the same Subsection to be elastic and indefinite.

In the instant case the “three-year moratorium” or “three-year period of rehabilitation”—both quotations from the United States Supreme Court's opinion in *Wright v. Vinton Branch of Mountain Trust Bank*, *supra*,—expired not later than March 25, 1943. From that date, the redemption pro-

cedure not having been set in motion, it was the duty of the court to liquidate the estate as in a general bankruptcy proceeding under a voluntary petition. This statement is definitely supported by Subsection (s) (6), which provides that, if the emergency ceases to exist, the court may "shorten the stay of proceedings herein provided for and *proceed to liquidate the estate.*" This means that after the stay expires, during which the bankrupt has not set in motion the "orderly procedure" which *must* be followed to the letter, as was made so clear by this Court in *Corey v. Blake*, 136 F. (2d) 162, the general bankruptcy procedure should immediately be set in motion by the referee, as indicated by Subsection (n) and by Subsection (3) (6), and the referee should notice a hearing for the appointment of a trustee, and upon his appointment the trustee should proceed to liquidate the estate as in general bankruptcy. It is never the *duty* of a creditor, especially a secured creditor, to take steps leading to the appointment of a trustee and the liquidation of the estate. Therefore, it could not possibly be held that, after the bankrupt's statutory right of redemption has expired, it is resurrected merely because a creditor brings to the attention of the referee his duty to proceed with liquidation. Nor could there be any merit in a contention that, although the statutory period of redemption is three years, a *creditor* can expand the statutory period indefinitely merely by failing to call the referee's attention to his duty.

III

APPELLANT'S CONTENTION HAS BEEN SUSTAINED BY A UNITED STATES DISTRICT COURT

The exact question presented by this review was before the Court *In re Miller*, 48 Fed. Supp. 13. In that case the three-year stay of proceedings under Section 75 (s) expired on May 8, 1942, and on July 18, 1942, the secured creditor filed a petition for the appointment of a trustee. Thereafter,

on July 31, 1942, the bankrupt filed with the Conciliation Commissioner a petition for the reappraisal of the real property. The Conciliation Commissioner made an order granting the reappraisal and this order was reviewed. To this extent the facts in the Miller case are identical with the facts in the present case. In the opinion in the Miller case the Court stated the question presented to be, "May the bankrupt have a reappraisal after the three-year limitation period?" The Court, after stating the provisions of Section 75 (s) (3) said:

"It is obvious that the limitation of time may be accelerated. The time may be shortened but it cannot be lengthened. 'A moratorium period not exceeding three years, during which the court's equitable supervision over the land continues,' *Wright v. Union Central Ins. Co.*, 304 U. S. 502, at page 515, 58 S. Ct. 1025, at page 1033, 82 L.Ed. 1490; rights and privileges are fixed.

"To invest the court with power to fix a moratorium not to exceed three years, the Congress did plainly limit the time to three years. The court gave the debtor the full time limit, to compose his debt. The debtor must function within that time, if he does not the Conciliation Commissioner has no power to enlarge the time. This moratorium is a statute of limitation, and the Commissioner's power ended on May 8th, 1942, except to liquidate the bankrupt estate.

"The Congressional committee exposition made in both Houses clearly shows that Congress intended to definitely fix the moratorium period not to exceed three years."

CONCLUSION

It is respectfully submitted that, in enacting this emergency legislation, Congress intended to and did provide for a three-year stay during, or on the final day of, which the bankrupt might exercise certain extraordinary privileges; that Congress did not intend or provide that the extra-

ordinary privileges should or could be exercised after the expiration of the three-year stay; that neither the secured creditors nor the courts have the right to depart from the "orderly procedure" prescribed by the Act and permit a reappraisal and redemption where the bankrupt never pays the appraised value into court and does not ask for a reappraisal until approximately six months after the expiration of the three-year stay.

RICHARD W. YOUNG,
M. G. HOFFMANN,
PERCY A. SMITH,
Attorneys for Appellant

No. 10,886

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FEDERAL FARM MORTGAGE CORPORATION

(a corporation),

Appellant,

VS.

HENRY ANDREW PAULSEN,

Appellee.

BRIEF FOR APPELLEE.

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FILED

JAN 31 1945

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IN THE

United States Circuit Court of Appeals

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FEDERAL FARM MORTGAGE CORPORATION

(a corporation),

Appellant,

vs.

HENRY ANDREW PAULSEN,

Appellee.

BRIEF FOR APPELLEE.

Appellee finds no fault with the "Statement of the Case" in appellant's brief, which is actually nothing but a chronological statement of the various legal steps taken in this proceeding. However, in addition thereto, the appellee feels that the following facts are of importance to show the good faith of the respective parties herein:

1. The appellant was the only creditor objecting to the offer of the appellee, and as a result of its petition prevented the appellee from effecting a compromise with his creditors. (Tr. 38.)

2. The Conciliation Commissioner found that during said three year stay of proceeding, the appellee paid into Court annual rental in the sum of five hun-

dred fifty dollars (\$550.00), pursuant to the order staying proceedings, and fully complied with said order. (Tr. 39.) The Conciliation Commissioner also stated in a letter written to Mr. Percy A. Smith, attorney for appellant (Tr. 31-d):

“I am very much surprised to receive these papers. Mr. Paulsen has paid all the rent that he was required to pay and I have been informed that he is ready to pay in the balance due on the appraised value of the property. The situation seems to be one similar to the discussed ‘In Re: Anderson, Fed. Supplement, Vol. 23, 854,’ where the Court recognizes that you have a legal right to the procedure now requested by you. In particular the Court says:

“ ‘Pursuing this undoubted right, the secured creditor may deprive the farmer of the intended ultimate benefit of the provisions of the Act which is the saving of his farm. Yet I think it was in the mind of Congress that the ordinary secured creditor would usually be willing to accept, in lieu of its security, its fair cash value as established by a fair appraisal; that the farmer to refinance himself within the meaning of the Act should be compelled to refinance not his full indebtedness but only the appraised value of the encumbered property as well as the unencumbered property retained by him; that he should not be compelled, in any case, to refinance the entire secured indebtedness, if such indebtedness exceeds the value of its security except to the extent that he might have other property or assets available for that purpose. Otherwise, judging from observation and experience, section 75, subsection

(s), intended to meet a great financial crisis among the farmers, can be helpful in comparatively few cases.'

"My observation in this case is that Mr. Paulsen has acted in good faith during the entire period of the moratorium."

3. That during the three year period, the appellant apparently accepted the original appraisal and permitted the appellee to work under the impression that this appraisal was acceptable to it. That relying on such impression, created by the failure of appellant to demand a reappraisal, the appellee, prior to the expiration of said period and on March 24, 1943, through his attorneys, informed the appellant that he had refinanced himself and could pay the entire balance due into Court. (See letter dated March 24, 1943, Tr. 28.)

4. That prior to replying to this letter, the appellant filed its petition of March 29, 1943 (Tr. 20) praying for the appointment of trustee to sell and dispose of appellee's estate. That thereafter various letters passed between the appellee's attorneys and officers or attorneys for the appellant. (Tr. 28 to 31-w.) That these letters clearly show:

1. That the appellee could, by selling certain personal property consisting mostly of hogs, and thus depleting the production of the farm at a time when wartime need demanded full production, pay off the balance due under the original order. (See letter to Percy A. Smith dated April 5, 1943, Tr. 31-a and 31-b.)

2. That appellee had refinanced himself and was ready, willing and able to pay the said balance into Court. (See letter to Percy A. Smith dated April 6, 1943, Tr. 31-c.)

3. That the appellant, throughout the three year period, would have refused to accept such payment (see letter of M. G. Hoffman dated April 9, 1943, Tr. 31-e), thus showing to the appellee that the making of said payment would be merely an idle gesture on his part since it would be refused, and thus showing that throughout the three year period the appellant was willing to have the appellee work long hours in the hope of salvaging his home and farm, with no intention of abiding by the original appraisalment but apparently hoping to gain by the enhancement of value to the property resulting from the appellee's desperate efforts to save his home.

4. That the appellee's attorneys informed the appellant that the appellee's wife had recently secured a little inheritance, and stated:

“As long as you are the only creditor that is not satisfied rather than sacrifice their pigs and take the bad licking that your action will make them take, she is willing to put in her little inheritance if a reasonable deal can be made with you. What amount will you accept in cash to assign your claim?”

(Letter to Federal Land Bank of Berkeley dated April 13, 1943, Tr. 31-i.)

This attempt to effect a compromise was flatly rejected by the appellant. See letter from M. G. Hoffman dated April 17, 1943 (Tr. 31-i) stating:

“You ask what amount we will accept in cash to assign our claim. We are not permitted to voluntarily scale down our loans, and, therefore, could not accept a payment from the bankrupt in any amount less than the total amount due.”

5. That thereafter appellee requested appellant, as a matter of good faith and as a part of the war effort in order to keep up production, to consent to a reappraisal, with the agreement that the reappraised value would be paid to the bank at once and the appellee thus be given a fair opportunity to save his ranch and pigs. (See letter to Federal Land Bank dated April 19, 1943, Tr. 31-l.) This offer was flatly rejected by the appellant. (See letter of Harold R. Kelly dated April 22, 1943, Tr. 31-q.)

6. That said letters (Tr. 28 to 31-w) as a whole show that at no time in said proceeding has the appellant acted in good faith, but that throughout said proceedings the appellant has acted solely with the view of obtaining possession of the ranch property and regardless of the cost or injustice to the appellee, and has relied on technicalities of the law to prevent the appellee from obtaining any benefit of the Frazier-Lemke Act, and thus has tried to profit by the fruits of the appellee's three years of labor.

7. That the appellee's efforts were appreciated and the attitude of the bank decried under wartime conditions by members of the Churchill County USDA

War Board. (See letter from said Board to Withers and Edwards dated April 22, 1943, Tr. 31-u.)

8. That the appellant is now and has been since March 24, 1943, ready, able and willing to:

a. Pay the balance due on the original appraisal.

b. Pay the balance due upon a reappraisal.

c. Effect a reasonable compromise of this matter.

ISSUES INVOLVED.

The referee certified the following issues:

1. If a bankrupt fails to pay the appraised value into Court and fails to request a reappraisal within three years, and a secured creditor requests the appointment of a trustee under the provisions of the last sentence of Section 75 (s) (3), can the bankrupt thereafter secure a reappraisal with the right to redeem under the first proviso under Section 75 (s) (3)?

2. Whether, under the circumstances in this case as set forth by the correspondence attached to the bankrupt's petition for reappraisal, the appellant is estopped to deny that the bankrupt is entitled to a reappraisal of said property.

ARGUMENT.**(a) THE BANKRUPTCY ACT.**

It will be noted from appellant's brief that this proceeding is a proceeding under Section 75 (s) of the Bankruptcy Act (11 USCA, Section 203, page 12). The portions of this section of the Bankruptcy Act to be considered in the instant case are:

1. Section (s) (2): "When the conditions set forth in this section have been complied with, the court shall stay all judicial or official proceedings in any court, or under the direction of any official, against the debtor or any of his property, for a period of three years. During such three years the debtor shall be permitted to retain possession of all or any part of his property, in the custody and under the supervision and control of the court, provided he pays a reasonable rental semi-annually for that part of the property of which he retains possession."

2. Section (s) (3): "At the end of three years, or prior thereto, the debtor may pay into court the amount of the appraisal of the property of which he retains possession, including the amount of encumbrances on his exemptions, up to the amount of the appraisal, less the amount paid on principal: Provided, That upon request of any secured or unsecured creditor, or upon request of the debtor, the court shall cause a reappraisal of the debtor's property, or in its discretion set a date for hearing, and after such hearing, fix the value of the property, in accordance with the evidence submitted, and the debtor shall then pay the value so arrived at into court, less payments made on the principal, for distribution to all

secured and unsecured creditors, as their interests may appear, and thereupon the court shall, by an order, turn over full possession and title of said property, free and clear of encumbrances to the debtor * * * If, however, the debtor at any time fails to comply with the provisions of this section, or with any orders of the court made pursuant to this section, or is unable to refinance himself within three years, the court may order the appointment of a trustee, and order the property sold or otherwise disposed of as provided for in this title.”

The appellee bases his claim for relief under the (n), and Section 75 (s) (6). The appellee fails to see how these sections are applicable since the appellee does not contend that the Court is authorized, under the Bankruptcy Act, to grant a moratorium of over three years, and the appellee further admits that if the appellee fails to comply with the order of the Court, that the Court may terminate or shorten the period of moratorium or the stay of proceedings upon proper showing.

The appellee basis his claim for relief under the terms of the Bankruptcy Act upon the sections hereinabove recited by the appellee. The appellant only cites a few cases to support his contentions in the matter. It will be noted that the references to the Congressional Record contained in paragraph (c), page 16, of appellant’s brief, is little more than an extract from a portion of the decision in the case of *In re Miller*, 48 Fed. Supp. 13, discussed by appellant in its brief on pages 18 and 19.

The *Miller* case is the only case we have been able to find which in any way substantiates the appellant's contentions. However, we do not believe the *Miller* case applicable to the case at bar for the reason that Judge Neterer, on page 14, states:

"The bankrupt failed to comply with the stay order as provided by Section 203, sub. s, supra, Tit. 11 U.S.C.A. or at all, and after expiration of the three years, continued default."

Thus the bankrupt at all times during the proceeding had failed to show his good faith, his ability to re-finance himself, or to pay the rent required by the Court, or otherwise comply with the Court order granting the three year stay. After the creditor had asked for a foreclosure, the bankrupt filed a petition for reappraisal. Apparently there was a complete absence of good faith on the part of the bankrupt, and his petition for reappraisal was merely an attempt to stall for time when he was already in default, and hence the Court's denying of this petition, which in effect extended the period of moratorium, was proper.

However, in the case at bar, the facts show that the appellee complied in every respect with the order granting the moratorium, and that prior to the expiration of that period, notified the secured creditor that he had refinanced himself and was able to pay the balance due upon the original appraisal, and requested a slight deferment of payment in order to prevent the sale of certain pigs sooner than they were properly developed, which would have caused a grievous loss to the bankrupt as well as being im-

proper under war conditions. (See letter from Churchill County U.S.D.A. War Board dated April 22, 1943, Tr. 31-u.)

The appellant not only refused to grant any extension of time, but also stated that at any time during the proceedings that the appraised value was paid in, it would have refused to accept the same.

In the *Miller* case the bankrupt was unable to re-finance himself and hence, under the Bankruptcy Act, Section 75 (s) (3), the Court ordered the appointment of a trustee, whereas in the case at bar, the facts show that the appellee had been able to finance himself during this period. The Court, under the facts existing in the *Miller* case, had no reason to consider that portion of Section 75 (s) (3) of the Bankruptcy Act, reading:

“*At the end of three years, or prior thereto, the debtor may pay into court the amount of the appraisal of the property * * **”

The appellee has found no case holding that under this section of the Act the amount of the original appraisal has to be paid actually into Court *prior* to the three years. The Act does not say *within said three year period* or *prior to the end of said three year period*, but says “*At the end of three years.*” In the present case the appellant was notified that the debtor was ready to pay into Court *prior* to the end of three years. The payment was not actually made, since it would have been foolish for the appellee to sacrifice his pigs in order to make this payment which the appellant had informed him would not be accepted.

The *Miller* case certainly does not hold, or purport to hold, that the debtor could not pay into Court the balance due unless he actually paid it *prior* to the end of the three years. The facts show the bankrupt notified the appellant *prior to the expiration of the period that he was refinanced* and was ready to pay into Court, but that without replying to appellee's letter of March 24, 1943, the appellant filed a petition for the sale of land and then notified the appellee that it would not accept the payment of the original appraisal even if it was made.

The appellee's petition for reappraisal is not for the purpose of delay or of denying the appellant any rights, but was for the purpose of insuring that the Court would either require the appellant to accept the balance due on the original appraisal, or the value set upon the property by such reappraisal. The evidence is that the appellee is willing to make either payment and is seeking merely to prevent the appellant from denying him the benefits of the Frazier-Lemke Act and depriving him of enhanced value of the property resulting from his three years' labor thereon.

The United States Supreme Court, in the case of *Wright v. Vinton Branch Mountain Trust Bank*, 300 U. S. 440, cited by appellant on pages 10 and 17 of its brief, passed upon the constitutionality of Section (s) and held that this section was constitutional, and that the Court did not have the right to grant more than a three year period of rehabilitation which could be terminated for cause at an earlier date. The Court

does not discuss a situation such as exists in the present case, and we see nothing in the dicta of this case that would affect the present case.

The case of *Wright v. Union Central Life Insurance Company*, 85 Law Edition, page 185, clearly shows the attitude of the United States Supreme Court as applied to a situation such as exists in the present case. The Court says:

“The narrow issue presented by this petition for certiorari and which moved us to grant it is whether under Section 75 (s) (3) the debtor must be accorded an opportunity, on his request, to redeem the property at the reappraised value or at a value fixed by the court before the court may order a public sale.”

In the present case the appellee is only asking that he be given an opportunity to redeem his property at the original appraised value, or at a reappraised value, or at a value fixed by the Court before the Court orders a public sale.

In the *Wright* case the Court also says, on page 187:

“True, the granting of a request for a public sale is mandatory. But so is the granting of a request for a valuation at which the debtor may redeem. Yet a reconciliation of these seemingly inconsistent remedies is not difficult if the purpose and function of the Act are not obscured. This Act provided a procedure to effectuate a broad program of rehabilitation of distressed farmers faced with the disaster of forced sales and an oppressive burden of debt. * * * Safeguards were pro-

vided to protect the rights of secured creditors, throughout the proceedings, to the extent of the value of the property * * * There is no constitutional claim of the creditor to more than that. And so long as that right is protected the creditor certainly is in no position to insist that doubts or ambiguities in the Act be resolved in its favor and against the debtor. Rather, the Act must be liberally construed to give the debtor the full measure of the relief afforded by Congress (*John Hancock Mut. L. Ins. Co. v. Bartels*, *supra*; *Kalb v. Feuerstein*, 308 U. S. 433, 84 L. ed. 370, 60 S. Ct. 343, 41 Am. Bankr. Rep. (N. S.) 501, *supra*), lest its benefits be frittered away by narrow formalistic interpretations which disregard the spirit and the letter of the Act.

“Equal protection to debtor and creditor alike can be afforded only by holding that the debtor’s request for redemption pursuant to the procedure prescribed in the first proviso of Section 75 (s) (3) cannot be defeated by a request of a secured creditor for a public sale under the second proviso. Certainly equal protection of debtor and creditor would not be obtained if the contrary view were followed. Then the debtor’s rights under the first proviso would be either dependent on the outcome of his race of diligence with a creditor, for which customarily he would be poorly equipped (*Cf. Kalb v. Feuerstein*, *supra*); or they would be defeasible at the instance of a creditor. Under our construction, however, the debtor will be given the benefit of an express mandate of the Act. And the creditor will not be deprived of the assurance that the value of the property will be devoted to the payment of its claim. For, as indicated in *Wright*

v. Vinton Mountain Trust Bank, 300 U. S. 440, 468, 81 L. ed. 736, 746, 57 S. Ct. 556, 112 A. L. R. 1455, 33 Am. Bankr. Rep. (N. S.) 353, if the debtor did redeem pursuant to that procedure, he would not get the property at less than its actual value. In that case this Court, in sustaining the constitutionality of Section 75 (s), emphasized that the Act preserved the right of the mortgagee to realize upon the security by a judicial sale. By our construction the exercise of this right is merely deferred or postponed until the other conditions and requirements of the Act, prescribed for the protection of the debtor, have been met. It is eventually denied the creditor only in case he is paid the full amount of what he can constitutionally claim.

“* * * But there is nothing in that opinion or in the Act which says that that power of the court may be utilized so as to wipe out the clear and express right of the debtor under Section 75 (s) (3) to redeem at the reappraised value or at the value fixed by the court. Nor can the existence of that power be fairly implied. The power of the court to ‘order the property sold or otherwise disposed of as provided for in this Act’ cannot be taken to mean a discretionary power to terminate the proceedings through the exclusive device of a public sale. Congress has provided that certain contumacious conduct on the part of the debtor or his inability to refinance himself within three years may be an appropriate basis for a termination of the proceedings or for an acceleration thereof. We cannot infer, however, that Congress intended that such facts should have any further legal significance under the Act. To hold that they

empowered the court to deprive the debtor of his express and fundamental statutory right to redeem at the reappraised value or at the value fixed by the court would be to imply a power of forfeiture wholly incompatible with the broad design of the Act to aid and protect farmer-debtors who were victims of the general economic depression.

* * * Such an important remedial right cannot be lost by mere implication. And to hold that the court has the discretion to deny or to grant the debtor's right to redeem at the reappraised value or at the value fixed by the court, dependent on general equitable considerations, would be to rewrite the Act, so as to vest in the court a power which Congress did not plainly delegate. This discretionary power of the court is exhausted when the court terminates the proceedings or accelerates their termination. Such termination can be effected only pursuant to the precise procedure which Congress has provided. And so we return to our reconciliation of the two apparently conflicting provisos of Section 75 (s) (3).

"We hold that the debtor's cross-petition should have been granted; that he was entitled to have the property reappraised or the value fixed at a hearing; that the value having been determined at a hearing in conformity with his request, he was then entitled to have a reasonable time, fixed by the court, in which to redeem at that value; and that if he did so redeem, the land should be turned over to him free and clear of encumbrances and his discharge granted. Only in case the debtor failed to redeem within a reasonable time would the court be authorized to order a public sale."

In the case of *In re Anderson*, 23 Federal Supplement 857, the Court, in commenting on the decision in this case of *Wright v. Mountain Trust Bank* cited by appellant, says:

“In the language of the decision, ‘Paragraph 3 also provides that “if * * * the debtor at any time * * * is unable to refinance himself within three years,” the court may close the proceedings by selling the property. This clause must be interpreted as meaning that the court may terminate the stay if after a reasonable time it becomes evident that there is no reasonable hope that the debtor can rehabilitate himself within the three-year period.’ But, for the farmer debtor to rehabilitate himself financially or refinance himself within the meaning of the provisions of subsection (s) of section 75, is it necessary that he place himself in position to pay in full all his creditors, secured or unsecured, or both? Or, is it only necessary that the debtor shall be able, during the statutory period of the moratorium, to pay a fair rental upon the property which he retains under subsection (s), both real and personal, with the exception of his unencumbered exemptions, and within such period put himself in position to pay for said property at its appraised, or, if reappraised, at its reappraised value? A careful reading of subsection (s) of section 75 in the light of the entire section shows, I think, that the latter meaning was intended.

“It must not be forgotten that we are dealing with a bankruptcy law that has for its purpose the salvaging of farmers who are insolvent and unable to pay their debts in full.”

The Court also, in commenting upon the right of the secured creditor to demand a public sale where the farmer is in a position to pay the original appraised value, says:

“Pursuing this undoubted right, the secured creditor may deprive the farmer of the intended ultimate benefit of the provisions of the Act which is the saving of his farm. Yet I think it was in the mind of Congress that the ordinary secured creditor would usually be willing to accept, in lieu of his security, its fair cash value as established by a fair appraisal; that the farmer to refinance himself within the meaning of the Act should be compelled to refinance not his full indebtedness but only the appraised value of the encumbered property as well as the unencumbered property retained by him; that he should not be compelled, in any case, to refinance the entire secured indebtedness, if such indebtedness exceeds the value of its security except to the extent that he might have other property or assets available for that purpose. Otherwise, judging from observation and experience, section 75, subsection (s), intended to meet a great financial crisis among the farmers, can be helpful in comparatively few cases.”

**THREE YEAR MORATORIUM IS NOT A REDEMPTION
STATUTE.**

Appellant, in its brief, beginning on page 17, attempts to compare the three year moratorium or three year period of rehabilitation to a redemption period. This comparison is not supported by any authority

cited by appellant. Furthermore, it is clear that it is not a redemption period in the manner contended by the appellant. The Bankruptcy Act itself, Section 75 (s) (3), shows that even after the three year moratorium has expired and after the property has been advertised for sale and sold, *the redemption period starts*. The Act says that debtor shall have ninety days to redeem any property sold at such sale. If the debtor, during this ninety day period, fails to redeem, then he is forever foreclosed immediately from his property. The Bankruptcy Act, however, does not give any such effect to the three year moratorium. All that the three year moratorium provides is that if he fails to do certain things, the creditor may, at the expiration of three years, take certain legal steps, as a result of which he may start the running of a true redemption period.

The appellee does not see how any of the other cases cited by appellant apply specifically in the case at bar, to-wit:

In re Carter, 56 Fed. Supp. 385;

Corey v. Blake, 136 F. (2d) 162;

Hard v. Kirkpatrick, 91 F. (2d) 875;

Home Building and Loan Ass'n v. Blaisdell, 290 U. S. 398, 54 S. Ct. 231;

Stratton v. New, 51 S. Ct. 465.

CONCLUSIONS.

In view of the foregoing facts and decisions, the appellee contends:

1. That the appellee should be permitted to acquire his property free and clear of liens and encumbrances:

a. By payment of the original balance due on the original appraisal;

b. By payment of the balance due on a reappraised value if his present petition be granted; or

c. By payment of a sum fixed by the Court as being reasonable and representing the true value of the property, since, as stated by the United States Supreme Court in the case of *Wright v. Central Life Insurance Company*, 85 Law Edition, page 185:

“* * * the debtor must be accorded an opportunity, on his request, to redeem the property at the reappraised value or at a value fixed by the court before the court may order a public sale.”

2. That the case of *In re Miller*, 48 Supplement 13, is not controlling for the following reasons:

a. In that case the bankrupt had failed in every way to comply with the order of the Court during the period of moratorium, and the petitioner would have had a right to request a foreclosure even prior to the expiration of a moratorium period because of bankrupt's default; whereas in the present case the Conciliation Commissioner has found that the bankrupt complied in every respect with the order of the Court granting the moratorium, paid each year the rental value of the property as fixed by the Court, and the



No. 10886

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FEDERAL FARM MORTGAGE CORPORATION,
a corporation, APPELLANT,

vs.

HENRY ANDREW PAULSEN, APPELLEE.

APPELLANT'S REPLY BRIEF

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No. 10886

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FEDERAL FARM MORTGAGE CORPORATION,
a corporation, APPELLANT,

vs.

HENRY ANDREW PAULSEN, APPELLEE.

APPELLANT'S REPLY BRIEF

I

**APPELLEE DID NOT FILE A CROSS APPEAL FROM THE
DISTRICT JUDGE'S DECISION ON THE SECOND QUESTION
PRESENTED TO HIM. THEREFORE, THE ISSUE THERE
INVOLVED IS NOT BEFORE THIS COURT.**

As stated in appellant's original brief, two questions were certified by the Conciliation Commissioner-Referee to the District Judge, who held that the first question should be answered in the affirmative and the second question in the negative. Appellant appealed from that portion of the decision of the District Judge which pertained solely to the first question. Appellee did not file a cross-appeal from the District Judge's decision on the second question.

In appellee's brief he makes no serious attempt to controvert appellant's contention as to the legal issue involved in the first question, and, in fact, supports the statement made

in his attorney's letter dated April 19, 1943, addressed to The Federal Land Bank of Berkeley, where it was said:

"I am inclined to agree with you that your bank is technically within the law and that since Mr. Paulsen did not actually pay into court the appraised value within three years, he has no technical right to make this payment now; ..." (TR. 31-1)

Appellee's additional facts, listed on pages 1 to 6 of his brief, as well as his argument, are devoted almost exclusively to the second question and the contention that there are equitable principles in favor of the appellee which should make the correspondence which passed between the appellee's attorneys and The Federal Land Bank of Berkeley pertinent to the issue, and, in fact, controlling. The second question certified to the District Judge was:

"2. Whether, under the circumstances in this case as set forth by the correspondence attached to the bankrupt's petition for reappraisal, the appellant is estopped to deny that the bankrupt is entitled to a reappraisal of said property."

The District Judge answered this in the negative. Since no appeal was taken therefrom by the bankrupt, it is submitted that the question is not before this Court. However, so that appellant's views will be available in case this Court should consider that the question is before it, appellant submits this reply brief.

II

**THERE IS ABSOLUTELY NO BASIS FOR APPELLEE'S ATTEMPT
TO PLACE UPON APPELLANT THE BLAME FOR HIS
FAILURE TO COMPLY WITH THE ORDERLY
PROCEDURE OF SECTION 75(S)(3).**

As a major premise, it is necessary to have in mind the fact that the three-year stay expired not later than March 25, 1943. Appellee makes much of the fact that under date

of March 24, 1943, a letter was written by his attorneys to The Federal Land Bank of Berkeley. (TR. 28, 29) The first letter written by the Bank to appellee's attorneys was dated April 2, 1943. (TR. 30) There had been no previous discussion or correspondence on the subject by or between the appellee and appellant. It is therefore evident that The Federal Land Bank of Berkeley could not possibly have said anything to the bankrupt or his attorneys during the three year stay, that would have in any way whatsoever influenced them regarding a compliance with the statute, which provides that "At the end of three years, or prior thereto, the debtor may pay into court the amount of the appraisal . . ."

The additional "facts" set forth in appellee's brief (pages 1-6) show that he bases his contention on wholly immaterial and irrelevant matters. We shall answer them seriatim.

His "fact" number 1 (page 1) is that appellant was the only creditor objecting to appellee's compromise offer. This is not material, nor, if it were, would it be unusual, since appellant was the only creditor having a lien on appellee's farm.

His "fact" number 2 (pages 1 and 2) is that he paid the rental which the statute required him to pay, and thereby acted in good faith. If he had not paid the rental, the three-year stay could have been shortened. His compliance with the law does not entitle him to any unusual favors which are not given him by the statute.

His "fact" number 3 (page 3) is that appellant did not ask for a reappraisal during the three years, and, apparently, that this lured appellee into failing to comply with the statute. The cause and effect, as conceived by appellee, are entirely without relativity or logic. The statement that on March 24, 1943, appellee "informed appellant that he had refinanced himself and could pay the entire balance due into court" is very misleading, as will readily be seen upon reading the letter of March 24, 1943. (TR. 28, 29) After stating

appellee's financial condition, the letter ended with: "I have in mind an extension of time with light payments." This is the direct converse of an offer or intention to make payment during the three-year period, or at the end thereof. Furthermore, in his letter of April 5, 1943, (TR. 31-b) it was made very clear that he never *intended* to pay the appraised value into court. His attorney said:

"Mr. Paulsen advises me that he is ready to pay into court the *balance due on the appraised value of the property* after deduction of principal payments made by him *by way of rental*."*

The courts have held that rental may not be credited on the appraised or reappraised value when a bankrupt attempts to redeem under the provisions of Section 75 (s) (3). *Wilson v. Dewey*, 133 F.(2d) 962; *Farmers Bank of Lohman v. Thompson*, 139 F. (2d) 408; *In re Schmidt*, 54 Fed. Supp. 262.

His "fact" number 4 (page 3) also contains misleading statements. It is said that "prior to replying to this letter, the appellant filed its petition of March 29, 1943." It is true that the petition was so dated, but it was verified on March 31, 1943, (TR. 24) and, although the date it was filed with the Conciliation Commissioner does not appear in the Transcript of Record, it was not received by or filed with the Conciliation Commissioner until on or after April 6, 1943.

His statement in his "fact" number 4-1, 2 (pages 3 and 4) also shows that his intention, even after the three years had expired, was to pay the original appraised value, *less the rental paid by him*. There is no showing whatsoever that he ever had or has had the ability to pay the original appraised value in full, *and he never offered to do so*.

In his "fact" number 4-3 (page 4) he says that throughout the three years appellant would have refused to accept

*Emphasis added to all quotations.

"such payment . . . thus showing to the appellee that the making of said payment would be merely an idle gesture." The letter from M. G. Hoffmann (TR. 31-e) referred to by appellee as showing him that the making of the payment would have been an idle gesture, was dated April 9, 1943, fifteen days *after* the time for making the payment into court had expired. Furthermore, it was not stated in said letter that appellant "would have refused to accept such payment." What was said, after explaining the reasons, was that "should the debtor have complied with the . . . Act, we would have requested a reappraisal." (TR. 31-f) This was appellant's statutory right and is no basis for appellee's statement that appellant was "apparently hoping to gain by the enhancement of value to the property resulting from appellee's desperate efforts to save his home." The original appraisal was \$3,000.00, and on March 29, 1943, the indebtedness under appellant's deed of trust was \$7,801.79. (TR. 21) Appellant had loaned appellee \$5,500.00 on September 3, 1935. Appellee was adjudicated bankrupt on May 1, 1939. In view of the trend toward higher values between these periods there was little reason for appellant to believe that property upon which it had loaned \$5,500.00 was actually worth but \$3,000.00 less than four years later, even without taking into consideration the "enhancement of value." Appellee valued the property at \$10,000.00 in his schedules. (TR. 8)

His "fact" number 4-4 (page 4) refers to a letter dated April 13, 1943, (TR. 31-i) in which it was stated by appellee's attorneys that appellee's wife had an inheritance which might be used to *compromise* the indebtedness due appellant rather than sacrifice their pigs. This letter was written very soon after appellee's other letters, wherein it was stated that "he could by selling all of his livestock and liquidating his assets" pay the amount necessary to be paid through the bankruptcy court. It seems quite probable that the inheritance was available when the previous letters were written,

and that the plea about not selling the pigs because of "war conditions" was more for effect than it was for cause.

His "facts" number 4-5, 7 (page 5) in which he again stresses the "war effort" and the desire (after the three years had expired) to procure appellant's consent to a reappraisal so he could "save his ranch and pigs" also fails to ring true. With the poor showing appellee had made during approximately eight years since he had procured the loan from appellant, it could easily be assumed that, if some other farmer acquired the property, there would be a more substantial boost to the "war effort" than if appellee continued to operate the farm.

His "fact" number 4-6, 7 (page 5) is another attempt to show that the equities, if not the law, are on his side simply because he allegedly acted in good faith and worked on his farm during the three-year stay, and, because appellant "acted solely with the view of obtaining possession of the ranch." Apparently he feels that appellant should be estopped from insisting on its legal rights, because it did not ask for a reappraisal. It hardly seems that he is entitled to the special considerations which he apparently thinks he should have because he worked on the farm during the three-year stay period. It has always been assumed that in enacting Section 75 Congress contemplated that a farmer-debtor would work hard and do everything possible in a last final effort to save his farm by complying with the statutory procedure *within the three-year stay period*.

There are no equities in favor of appellee. Even if there were, the courts have held that equitable principles may not be substituted for the "orderly procedure" prescribed by the statute. In *Borchard v. California Bank*, 107 F.(2) 96, (310 U. S. 311, 60 S.Ct. 957), this Court early in the judicial history of the present Frazier-Lemke Act held, in effect, that where a bankrupt had procured the same benefits under an

agreement with his creditors as he would have been able to procure by an order under Section 75(s) (2), he should not be entitled to an additional three-year stay merely because the statutory procedure had not been followed to the letter. The Supreme Court of the United States disagreed and held that the orderly procedure of the statute must be followed. Since said decision it has been necessary for their own protection for creditors to insist that the "orderly procedure" be followed, and not to permit—even though they might be inclined to do so—and deviation from the law. Accordingly, appellant was in no position to consent to a "compromise" in lieu of payment of the appraised value into court, nor to a reappraisal after the expiration of the three-year stay.

His "fact" number 4-8 (page 6) states that appellee has been, since March 24, 1943, ready, able and willing to "pay the *balance* due, etc." This is further proof of the fact that under no circumstances would he have paid into court more than the difference between the appraised or reappraised value and the rental he had paid during the three-year stay.

Appellee's Argument is almost entirely a repetition of the arguments contained in his additional "facts." He repeats that the facts show that appellee notified appellant "prior to the expiration of the period that he was refinanced." He also repeats his reference to the "balance due" on the original appraisal. (page 11) His "prior" notice was his letter of March 24, 1943, written in Reno, Nevada, the day before the three-year stay expired, and mailed to appellant in Berkeley, California. The letter clearly was not a tender, but was a request for an extension of time. (TR. 28, 29) Payment into court is a statutory requirement. The letter shows unequivocally that upon its receipt there was nothing appellant could have done, before the end of the three years, that could have helped appellee pay the appraised value into court, as required by the statute. Section 75(s) (3) does not provide

for a compromise of composition with creditors, but provides for a *redemption* through the bankruptcy court. We have no less an authority than the Supreme Court of the United States that the first proviso of Section 75(s) (3) constitutes a redemption statute. The word "redeem" was first applied to the effect of paying the appraised or reappraised value into court in *Wright v. Union Central Life Insurance Company*, 311 U. S. 273, 61 S. Ct. 196, 85 L. ed. 184.

In his brief appellee says:

"In the present case the appellee is only asking that he be given an opportunity to redeem his property at the original appraised value, or at a reappraised value or at a value fixed by the Court before the Court orders a public sale." (page 12)

This is conceded. However, he had this opportunity for the full three-year period which Congress provided. Now he is "only asking" this Court to grant him a right that Congress did not see fit to grant any debtor.

III

APPELLEE'S ATTEMPT TO DISTINGUISH THE MILLER CASE WILL NOT BEAR CLOSE SCRUTINY

Appellee seeks to distinguish the instant case from *In re Miller*, 48 Fed. Supp. 13. The question in the Miller case was exactly the same as the first question in the instant case; that is, whether a bankrupt under Section 75(s) has the legal right to have his property reappraised after the expiration of the three-year period where he failed to pay the appraised value into court, or even to attempt to do so, during the three-year period, and the creditor had therefore taken steps toward having a trustee appointed and the estate liquidated.

The distinction, according to appellee, is that in the Miller case the bankrupt was unable to refinance himself during

the three-year stay. On the other hand, appellee claims that in the instant case "the bankrupt notified the appellant prior to the expiration of the period that he was refinanced." This is a tenuous distinction which will not bear close examination. There certainly could be no better evidence of the fact that a bankrupt "is unable to refinance himself within three years" than the fact that he *did not* do so. Since Congress provided for the appointment of a trustee and liquidation of the estate where a bankrupt *does not refinance himself within the three years*, this Court, in order to hold with the bankrupt would have to "rewrite" the fore part of Sec. 75 (s) (3).

IV

APPELLEE HAS CONFUSED THE PROCEDURES UNDER THE FIRST AND UNDER THE SECOND PROVISIO OF SECTION 75(S)(3)

Appellee contends that the "three-year moratorium is not a redemption statute." In support of this contention appellee refers to the ninety-day redemption period provided for in Section 75 (s) (3) where the property is sold at public auction under the provisions of the *second* proviso of Section 75 (s) (3). Appellee has confused the two procedures. In the instant case the provisions of the *first* proviso and not the *second* proviso are involved. If appellant prevails the property will be sold either by the bankruptcy trustee or under appellant's deed of trust, and appellee will have an opportunity to bid. Furthermore, as appellee was advised in appellant's letter of April 17, 1943, (TR. 31-i to 31-l) if appellant acquires title it will establish a sales price based upon the market value of the property, and the bankrupt will have an equal opportunity to buy the property at such sales price for cash. *Except for appellee's apparent belief that upon a re-appraisal the value of the property will be established at less than its market value*, it is difficult to see why the procedure suggested by appellant in said letter of April 17, 1943, would

not have been preferable to appellee. By the time the property would have been offered for sale, the little pigs would no doubt have matured, and it would not have been necessary for appellee either to sacrifice the little pigs or to use his wife's inheritance. He would still have been entitled to his discharge in bankruptcy.

CONCLUSIONS

Appellant can not see that appellee has submitted any authority, or any pertinent argument, against the legal principle set forth in appellant's Statement of Points on Appeal. (TR. 47) It is respectfully submitted that the second question certified to the District Judge is not before this Court, or, if it is, that it must again be answered in the negative, as it was answered by the District Judge.

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Attorneys for Appellant

No. 10890

United States
Circuit Court of Appeals
For the Ninth Circuit.

BRIAN CONNOLLY and DANIEL CONNOLLY,
Appellants,
vs.
UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Montana

FILED

NOV 24 1944

PAUL P. O'BRIEN,
CLERK

No. 10890

United States
Circuit Court of Appeals

For the Ninth Circuit.

BRIAN CONNOLLY and DANIEL CONNOLLY,
Appellants,

vs.

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Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Montana

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[1*]

In the District Court of the United States in and
for the District of Montana
Great Falls Division.

No. 305.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BIRAN CONNOLLY and
DANIEL CONNOLLY,

Defendants.

Be It Remembered, that on November 22, 1941, a
Complaint was duly filed herein, in the words and
figures following, to-wit: [2]

[Title of District Court and Cause.]

COMPLAINT

The United States of America, a sovereign power,
by the Attorney of the United States, in and for
the District of Montana, acting under the author-
ity and direction of the Attorney General of the
United States, brings this suit against the above-
named defendant, and for its cause of action com-
plains and alleges as follows, to-wit:

I.

That the District Court of the United States, in
and for the District of Montana, has jurisdiction
herein, for the reason that the United States of
America is the party plaintiff.

II.

That the defendants, Biran Connolly and Daniel Connolly, are, one and both, citizens of the state and district of Montana, residing near the town of Blackfoot [3] in the county of Glacier, in the state and district of Montana.

III.

That the Blackfeet Indian Reservation was established by Executive Proclamation, pursuant to a treaty concluded between the plaintiff herein and the Blackfeet and other tribes of Indians, said Blackfeet Indian Reservation being thereafter diminished in the land area thereof by Article IX of an act to ratify and confirm an agreement with the Gros Ventre, Piegan, Blood, Blackfeet, and River Crow Indians in Montana (28 Stat. 113), approved May 1, 1888, and Article I of Section 9 of the agreement with Indians of the Blackfeet Indian Reservation in Montana, dated and signed at Blackfeet Agency, Montana, on the 26th day of September, 1895, the said Blackfeet Indian Reservation embracing a tract of land within the present judicial district of Montana, which is set apart for the exclusive use and occupation of the Indians of the Blackfeet Indian Reservation in Montana, the boundaries of said diminished reservation now being defined by the terms of said agreements as follows:

Beginning at a point in the middle of the main channel of the Marias River opposite the

mouth of Cut Bank Creek; then up Cut Bank Creek, in the middle of the main channel thereof, twenty miles, following the meanderings of the Creek; thence due north to the northern boundary of Montana; thence west along said boundary to a point on the northern boundary of the reservation due north from the summit of Chief Mountain, and running thence south to said summit; thence in a straight line to the most northeasterly point of Flat Top Crag; Thence to the most westerly of the mouths of Divide Creek; thence up said Creek to a point where a line drawn from the said northeasterly point of Flat Top Crag to the summit of Divide Mountain intersects Divide Creek; thence to the summit of Divide Mountain; thence in a straight line to the Western extremity of lower [4] Two Medicine Lake; thence in a straight line to a point on the southern line of the right-of-way of the Great Northern Railway Company four miles west to the western end of the lower bridge across the North Fork of the Two Medicine River; thence in a straight line to the summit of Heart Butte, and thence due south to the southern line of the present reservation, which is a point on the north fork of Birch Creek, thence easterly down the north fork of Birch Creek to the main stream of Birch Creek; thence down Birch Creek, in the middle of the main channel thereof, to the Marias River; thence down the Marias River, in the middle of the main channel thereof, to the place of beginning;

that all lands and premises within said boundaries now constitute the Blackfeet Indian Reservation and are located within the state and district of Montana; that all of the lands hereinafter described are located and situated within the present boundaries of the Blackfeet Indian Reservation and are allotted Indian lands of Indians of the Blackfeet Indian Reservation in Montana, words of the plaintiff herein, and are lands and premises within the exclusive jurisdiction of this Court.

That the plaintiff was, at all the times herein mentioned, ever since has been, and now is, the absolute owner in fee simple of, and entitled through its Indian wards, as aforesaid, to the undisputed possession and control of all of the said lands and premises of the Blackfeet Indian Reservation.

IV.

That the above-named defendants, Biran Connolly and Daniel Connolly, are, one and both, Indian persons, wards of the Government of the United States and under the charge of the Superintendent in charge of the Blackfeet Indian Reservation, in the state and district of Montana. [5] That the defendant, Biran Connolly, is entitled to grazing privileges on said Blackfeet Indian Reservation for

255 head of cattle on the following described lands and premises:

Sections 23, 24, 25, 26, 27, 28, 33, 34, 35 and 36, Township 35 North, Range 9 West and the Southwest Quarter of Section 24, Southeast Quarter of Section 29, North Half Southeast Quarter, Northeast Quarter Southwest Quarter, East Half, Southeast Quarter Southwest Quarter, Section 28, the West Half West Half Section 27, the North Half Northeast Quarter, South Half North Half, Section 33, Township 34 North, Range 9 West. The Southeast Quarter Northwest Quarter, Southeast Quarter of Section 9, Northeast Quarter of Section 10, North Half, Northwest Quarter Southwest Quarter, Northeast Quarter Southeast Quarter, Section 15; Northwest Quarter, West Half Northeast Quarter, Section 15, Southeast Quarter Section 10, Southwest Quarter, South Half Northwest Quarter, Section 11, Township 33 North, Range 9 West.

V.

That for many months last past and in particular from on or about the 6th day of August, 1941, to and inclusive of the date of the filing of this complaint, the abovenamed defendants, Biran Connolly and Daniel Connolly, drove, or caused to be driven, drifted and allowed to drift, and herded upon the allotted lands and premises of said Blackfeet Indian Reservation, more particularly described, as follows:

Sections 23, 24, 25, 26, 27, 34 and 35, in Township 35 North, Range 10 West, Montana Principal Meridian; Sections 3 and 10, Township 34 North, Range 9 West, Montana Principal Meridian; Sections 11 and 14, Township 35 North, Range 9 West, Montana Principal Meridian; Sections 20 and 21, Township 35 North, Range 9 West, Montana Principal Meridian; Southwest Quarter of the Northeast Quarter of Section 22, Township 34 North, Range 9 West, Montana Principal Meridian; Sections 16 and 21, Township 35 North, Range 9 West, Montana Principal Meridian; North Half of Section 11, Township 35 North, Range 9 West, Montana Principal Meridian; and South Half Section 11, Township 35 North, Range 9 West, Montana Principal Meridian;

[6] and other lands and premises within the confines of said Blackfeet Indian Reservation, a large number of cattle, to-wit approximately 260 head, the exact number thereof being to the Attorney of the United States, in and for the District of Montana, unknown, and a large number of horses, to-wit: approximately 75 head, the exact number thereof being to the Attorney of the United States, in and for the District of Montana, unknown, causing said cattle and horses to graze and pasture on and upon said lands and premises and to eat and destroy the grasses and other feed and forage and herbage growing thereon;

That the driving, drifting and herding of said

Cattle and horses on and upon said lands and premises, as aforesaid, was done by the said defendants, Biran Connolly and Daniel Connolly, intentionally, knowingly, willfully, unlawfully, and without consent, and in open defiance of the plaintiff, its officers and agents, and without said defendants ever having at any of said times any permit or any other right or authority whatsoever to drive and ing said cattle and horses on and upon said lands and premises, and that the said defendants have at all the times hereinbefore mentioned, ever since have been, and now are driving, drifting and herding said cattle and horses on and upon said lands and premises without the consent of the plaintiff herein, its officers and agents, and without the consent and against the wishes of said Indians of the Blackfeet Indian Reservation, and without paying for the privilege of grazing and herding said cattle on and upon said allotted lands and premises on the Blackfeet Indian Reservation as aforesaid. [7]

VI.

That from on or about the 6th day of August, 1941, up to and including the date of the filing of this complaint, the said 260 head of cattle and 75 head of horses grazed on and upon said lands and premises as hereinbefore described and pastured upon said lands and premises, and destroyed the grasses, feed, forage and herbage growing thereon and are continuing so to do. That the said driving, drifting, herding, and grazing of said cattle and horses on and upon the allotted lands and premises

of said Blackfeet Indian Reservation, as aforesaid, have damaged the grasses and other feed and forage and herbage growing thereon in the sum of \$1,341.00.

VII.

That the plaintiff has repeatedly requested the above-named defendants, on divers occasions, to remove said cattle and horses from said lands and premises but that the defendants have always refused so to do and still refuse to do so; that the defendants are continuing to drive, drift, allow to drift, herd, and graze said cattle and horses on and upon said lands and premises and are now driving, drifting, and allowing to drift, herding, and grazing said cattle and horses on and upon said lands and premises and will continue so to do; that the defendants' willful and wrongful trespasses, upon said lands and premises, are continuous in their nature; and that the defendants are wholly insolvent and unable to respond in damages to the plaintiff and its Indian wards; that a multiplicity of suits will be necessary to protect and enforce the rights of the plaintiff and its Indian wards in said lands and premises, unless an injunction can be obtained to protect said lands and premises from the constant and unauthorized use by the said defendants; that [8] if the defendants are allowed to continue the willful and wrongful trespassing of their said cattle and horses on and upon said lands and premises, said lands and premises will become useless to the plaintiff and its Indian wards, and the

injuries and damages to be suffered by the plaintiff and its Indian wards will be impossible of computation, since it will be impossible to ascertain the damages to said lands and premises if the said defendants continue to willfully and wrongfully trespass their cattle and horses thereon; that unless an injunction is issued to protect the rights of the plaintiff and its Indian wards in said lands and premises, waste will be committed on said lands and premises by the grazing and pasturing of said cattle and horses thereon and by the trampling of the grasses, feed, forage and herbage growing thereon, by said cattle and horses—all to the great and irreparable damage of the plaintiff and its Indian wards, without an opportunity to collect damages from the above-named defendants.

VIII.

That the plaintiff further avers that the said defendants, Biran Connolly and Daniel Connolly, have willfully refused to move their cattle and horses from said lands and premises and continue and will continue to trespass on and upon said lands and premises and will permit their cattle and horses to eat and destroy the grasses, feed, herbage and other forage growing thereon, and to trample and destroy the same, and said defendants, one and both, refused to move their said cattle and horses upon instructions of authorized officers of the Indian Service when an injury is being done

to the range of the Blackfeet Indian Reservation by reason of the improper handling of said cattle and horses by the said defendants, and said defendants will not remove their said cattle and horses from said lands and premises unless compelled so to do. [9]

IX.

That the rated carrying capacity of the range on the said Blackfeet Indian Reservation is 24 acres per one head of cattle per year, based on a ten-month yearly period, and 36 acres per one head of horses per year, based on a ten-month yearly period, and 6 acres per one head of sheep per year, based on a ten-month yearly period.

X.

That the plaintiff, by reason of the foregoing, has no plain, adequate and complete remedy at law herein against the repeated trespassing of the defendants, and no remedy whatsoever, save in a Court of equity where matters such as those hereinabove set forth are cognizable.

Wherefore, the plaintiff prays that it recover damages, against the said defendants, in the sum of \$1,341.00; and that the plaintiff do have and recover its cost and disbursements herein laid out and expended.

The plaintiff further prays that a temporary injunction be issued against the above-named defendants, enjoining them from driving, drifting, allowing to drift, herding, or conveying any livestock

whatsoever on or upon, or permitting the same to be driven, drifted or allowed to drift, herded, or conveyed, or pastured, grazed, or fed on and upon any of the lands and premises hereinbefore described, or any part thereof, during the pendency of this action, save upon the lands and premises lawfully within the possession of the defendants; and that upon final hearing said injunction be made permanent and perpetual; and that the said defendants be required to show cause, if any they have, why an injunction pendente lite should not be issued to enjoin them from driving, drifting, allowing to drift, herding, or conveying any live- [10] stock whatsoever on or upon, or permitting the same to be driven, herded, drifted, or allowed to drift, or conveyed, pastured, grazed, or fed, on or upon any of the lands and premises hereinbefore described, or any part thereof, or otherwise interfering with the possession, use and enjoyment of said lands and premises by the plaintiff and its Indian wards.

And for such other and further relief in the premises as to the Court may seem meet and equitable.

JOHN B. TANSIL,

Attorney for the United
State, in and for the Dis-
trict of Montana.

ROY F. ALLAN

Assistant Attorney of the
United States, in and for
the District of Montana.

Attorneys for the Plaintiff.

United States of America

District of Montana—ss.

Roy F. Allan, being first duly sworn, upon his oath deposes and says:

That he is a duly appointed, qualified and acting Assistant Attorney of the United States, in and for the District of Montana, and as such, makes this verification to the foregoing complaint; that he has read the same and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

ROY F. ALLAN

Subscribed and sworn to before me this 22nd day of November, 1941.

[Seal]

C. G. KEGEL

Deputy Clerk of the United
States District Court, in
and for the District of
Montana. [11]

DESIGNATION AND CONSENT OF SERVICE

Comes Now John B. Tansil, Attorney of the United States, in and for the District of Montana, and Roy F. Allan, Assistant Attorney of the United States, in and for the District of Montana, and pursuant to Rule 34 of the Rules of Practice of the United States District Court for the District of Montana, hereby designate and consent that service of all subsequent papers, in the above-entitled action, except writs and process, may be made upon them, or either of them, as the attorneys for the

plaintiff, United States of America, at the office of the United States Attorney, 219 Federal Building, Billings, Montana.

JOHN B. TANSIL,

Attorney of the United
States, in and for the Dis-
trict of Montana.

ROY F. ALLAN

Assistant Attorney of the
United States, in and for
the District of Montana.

Attorneys for Plaintiff.

Address: Rooms 217, 219, 224, and 228, Federal
Building, Billings, Montana.

[Endorsed]: Filed Nov. 22, 1941. [12]

Thereafter on December 13, 1941, Summons was duly filed herein, in the words and figures following, to-wit: [13]

[Title of District Court and Cause.]

SUMMONS

The President of the United States of America
To Biran Connolly and Daniel Connolly, the above-
named defendants: Greeting:

You are hereby summoned and required to serve
upon Roy F. Allan, Assistant Attorney of the
United States, in and for the District of Montana,
Plaintiff's attorney, whose address is Room 219,
Federal Building, Billings, Montana, an answer

to the complaint which is herewith served upon you, within twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

C. R. GARLOW

Clerk of the District Court
of the United States, in
and for the District of
Montana.

By C. G. KEGEL

Deputy Clerk.

Dated this 22nd day of November, 1941.

JOHN B. TANSIL,

Attorney of the United States,
in and for the District of
Montana.

ROY F. ALLAN,

Assistant Attorney of the
United States, in and for
the District of Montana.

Address: Room 219, Federal Bldg., Billings, Montana. [14]

RETURN ON SERVICE OF WRIT

United States of America,
District of Montana—ss.

I hereby certify and return that I served the annexed Summons on the therein-named Biran Connolly and Daniel Connolly by handing to and leaving a true and correct copy thereof with each of them personally at 27 miles northeast of Brown-

ing in said District on the 3rd day of December, 1941.

E. LIEBERG

U.S. Marshal

By EDGAR TAYLOR,
Deputy.

[Endorsed]: Filed December 13, 1941. [15]

Thereafter, on December 13, 1941, Order to Show Cause was duly filed herein, in the words and figures following, to-wit: [16]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Be It Remembered that the plaintiff in the above-entitled cause, having commenced an action in the District Court of the United States, in and for the District of Montana, Great Falls Division, against the above-named defendants, Biran Connolly and Daniel Connolly, and having prayed for an injunction against said defendants requiring them to refrain from certain acts in said complaint and hereafter more particularly mentioned:

Now, on reading the complaint on file in said cause, duly verified by the oath of one of the plaintiff's attorneys, Roy F. Allan, Assistant Attorney of the United States, in and for the District of Montana; and it appearing to me therefrom that there are sufficient grounds for granting an order to show cause, why an injunction should not be granted; no

undertaking for security being required to be given on the part of the applicant, the United States of America, the plaintiff herein; and [17]

Now, Therefore, it is Hereby Ordered, by the Court, that the defendants herein, Biran Connolly and Daniel Connolly, appear before this Court on the 8th day of December, 1941, at ten o'clock in the forenoon of said day, at the Courtroom in the Federal Building, in the city of Great Falls, in the County of Cascade, in the state and district of Montana, or as soon thereafter as counsel may be heard, to show cause, if any they have, why they, the said defendants Biran Connolly and Daniel Connolly, should not be enjoined and restrained from their unlawful driving, drifting, allowing to drift, herding, or conveying of any livestock on or upon, or permitting the same to be driven, drifted, herded or conveyed or pastured, or fed on or upon any of the lands and premises more particularly described, as follows, to-wit:

Sections 23, 24, 25, 26, 27, 34 and 35, in Township 35 North, Range 10 West, Montana Principal Meridian; Sections 3 and 10, Township 34 North, Range 9 West, Montana Principal Meridian; Sections 11 and 14, Township 35 North, Range 9 West, Montana Principal Meridian; Sections 20 and 21, Township 35 North, Range 9 West, Montana Principal Meridian; Southwest Quarter of the Northwest Quarter of Section 22, Township 34 North, Range 9 West, Montana Principal Meridian; Sections 16 and 21, Township 35 North, Range

9 West, Montana Principal Meridian; North Half of Section 11, Township 35 North, Range 9 West, Montana Principal Meridian; and South Half Section 11, Township 35 North, Range 9 West, Montana Principal Meridian.

And it is Further Ordered, by the Court, that a copy of the complaint and a copy of this order be served on the above-named defendants, Biran Connolly and Daniel Connolly, at least two days before the appearance date hereinbefore in this order set forth. [18]

Dated at Great Falls, Montana, this 22nd day of November, 1941, at 3:40 p.m. o'clock in the afternoon of said day.

CHARLES N. PRAY,

Judge of the United States
District Court, in and for
the District of Montana.

Entered Nov. 22, 1941.

[Endorsed]: Filed Dec. 13, 1941. [19]

Thereafter, on December 16, 1941, a Preliminary Injunction was duly filed herein, in the words and figures following, [20] to-wit:

[Title of District Court and Cause.]

PRELIMINARY INJUNCTION

The President of the United States to Biran Connolly and Daniel Connolly and all of their officers,

agents, servants, employees, attorneys, and all those in active concert or participation with them, Greeting:

In the above-entitled action, plaintiff having filed its duly verified complaint, in which, among other things, it prays for an injunction, and it appearing to the above-entitled Court that a preliminary injunction should issue in the premises for the reasons following:

It appearing that for many months last past, and in particular from on or about the 6th day of August, 1941, to and inclusive of the date of the filing of the plaintiff's complaint, the above-named defendants, Biran Connolly and Daniel Connolly, drove, or caused to be driven, drifted, or allowed to drift, and herded upon the allotted lands and premises of the said Blackfeet Indian Reservation, as hereinafter more particularly described, and other allotted Indian lands and premises within the confines of the said Blackfeet Indian Reservation, approximately two hundred sixty head of cattle, and [21] approximately seventy-five head of horses, causing said cattle and horses to graze and pasture on or upon said Indian lands and premises, and to eat and destroy the grasses and other feed and forage and herbage growing thereon; that the driving, drifting and herding of said cattle and horses on and upon said lands and premises, as aforesaid, was done by the said defendants intentionally, knowingly, willfully, unlawfully and without the consent and in open defiance of the plaintiff, its officers and agents, and without the said defendants ever having

at any of said times any permit or other right or authority whatsoever to drive, and herd said cattle and horses on or upon said Indian lands and premises, and that the said defendants have at all of the times herein mentioned ever since, have been and now are driving, drifting and herding said cattle and horses on and upon said lands and premises without the consent of the plaintiff herein, its officers and agents, and without the consent and against the wishes of said Indians of the Blackfeet Indian Reservation, and without paying for the privilege of grazing, herding and feeding said cattle and horses on and upon said allotted lands and premises of the Blackfeet Indian Reservation, as aforesaid;

No bond or undertaking being required of the plaintiff, the United States of America:

Now, Therefore, you, the said Biran Connolly and Daniel Connolly, the above-named defendants, and all of your officers, agents, servants, employees, attorneys and all those in active concert and participating with you, are hereby absolutely enjoined and restrained during the pendency of the above-entitled action, and until its final determination or until the Court shall otherwise order, [22] from driving, drifting, allowing to drift, herding or conveying any livestock on or upon, or permitting the same to be driven, drifted, allowed to drift, herded or conveyed or pastured, grazed or fed on or upon any of the lands and premises hereinafter described, as follows, to-wit:

Sections 23, 24, 25, 26, 27, 34 and 35, in Township 35 North, Range 10 West, Montana Principal Meridian; Sections 3 and 10, Township 34 North, Range 9 West, Montana Principal Meridian; Sections 11 and 14, Township 35 North, Range 9 West, Montana Principal Meridian; Sections 20 and 21, Township 35 North, Range 9 West, Montana Principal Meridian; Southwest Quarter of the Northeast Quarter of Section 22, Township 34 North, Range 9 West, Montana Principal Meridian; Sections 16 and 21, Township 35 North, Range 9 West, Montana Principal Meridian; North Half of Section 11, Township 35 North, Range 9 West, Montana Principal Meridian; and South Half Section 11, Township 35 North, Range 9 West, Montana Principal Meridian.

Given Under My Hand and the seal of the District Court of the United States in and for the District of Montana, this 11th day of December, 1941.

C. R. GARLOW,

Clerk of the above-entitled
Court.

By C. G. KEGEL

Deputy Clerk.

ACKNOWLEDGMENT OF SERVICE

Due and Personal Service of the within and foregoing preliminary injunction made and admitted

and the receipt of a true copy thereof acknowledged this 13th day of December, 1941, pursuant to the oral stipulation entered into in open court at Great Falls, Montana, on December 8, 1941, by and between the attorneys of record herein, in the presence of and with the consent of the defendants, and extended on the minutes of the Court whereby said defendants requested and consented that said preliminary injunction be served on them by mail in order to save to said defendants the Marshal's costs of service thereof.

JOHN W. COBURN

Attorney for the Defendants.

[Endorsed]: Filed Dec. 16, 1941. [23]

Thereafter, on October 19, 1942, the Answer of Daniel Connolly was duly filed herein, in the words and figures following, to-wit: [24]

[Title of District Court and Cause.]

ANSWER

For answer to the complaint of the plaintiff in the above entitled action the defendant Daniel Connolly admits and denies as follows. towit:

I.

Admits the allegations of paragraphs I, II, III, IV and IX.

II.

Denies the allegations of Paragraphs V, VI, VII, VIII and X.

Wherefore having fully answered the complaint of the plaintiff the defendant Daniel Connolly prays judgment that plaintiff's complaint be dismissed as to this defendant and for such other and further relief as may be equitable just and proper.

E. J. McCABE

Attorney for defendant.

Suite 2 Liberty Theater Bldg.

Great Falls, Montana

[Endorsed]: Filed Oct. 19, 1942. [25]

Thereafter, on October 19, 1942, the Amended Answer of Brian Connolly was duly filed herein, in the words and figures following, to-wit: [26]

[Title of District Court and Cause.]

AMENDED ANSWER OF BRIAN CONNOLLY

The above named defendant Brian Connolly in answer to the complaint of the plaintiff in the above entitled action admits, denies and alleges as follows, towit:

FIRST

I.

Admits the allegations of paragraphs I and II thereof.

II.

Save and except as hereinafter in this answer qualified defendant admits the allegations of paragraph III of said complaint.

III.

Admits the allegation of paragraph IV of said complaint and alleges that said defendant is entitled to grazing privileges on the Blackfeet Indian Reservation on lands other than and additional to the lands described in paragraph IV as hereinafter in this answer set forth and described.

IV.

Admits the allegation of paragraph V of said complaint save and except that defendant denies that approximately 260 head of cattle and approximately 75 head of horses were driven [27] or drifted or allowed to drift or herded upon said described lands and alleges the fact to be that the total number of head of horses and cattle driven, drifted, allowed to drift or herded upon the said lands by this defendant did not exceed a total of 255 head or the equivalent thereof as hereinafter set forth, and defendant denies that his acts in connection of grazing and pasturing of said described lands were unlawful or without the consent or in open defiance of the plaintiff, its officers or agents and denies that said defendant did not have at any of said times any permit or right or other authority to drive or herd cattle and horses upon said lands and premises and denies that either at the time of filing the complaint in said action or at any time since this defendant was or now is driving or drifting

or allowing to drift or herding cattle or horses upon said lands and premises without the consent of the plaintiff or its officers or agents or without the consent or wish of the Indians of the said Blackfeet Reservation without paying for the privileges of herding cattle and horses on said lands and alleges the fact to be that the said defendant had the express permission and consent and authority of the plaintiff its officers and agents and of the Indians of the Blackfeet Indian Reservation to graze and herd the cattle and horses grazed and herded and allowed to graze and herd upon the described lands by this defendant all of which hereinafter more fully appears.

V.

Denies the allegation of paragraph VI of said complaint and alleges that the cattle and horses not exceeding 255 head or the equivalent thereof as hereinafter set forth, grazed and herded on said lands by defendant were grazed and herded in conformity with express permission, consent and authority of the plaintiff its officers and agents and the Indians of the Blackfeet Indian Reservation, and denies that the grasses, feed, and forage, and [28] herbage or any thereof growing on the said described lands were damaged in the sum of money said in paragraph VI or in any sum or in any manner.

V.

Denies this defendant at the time of filing the complaint or theretofore drove, drifted, and allowed

to drift, cattle and horses upon said lands and premises and are now driving, drifting and allowing to drift and graze cattle and horses upon said lands and premises to a number greater than the said defendant was authorized and permitted to do by plaintiff its officers and agents and Indians of Blackfeet Indian Reservation, and denies that defendant will hereafter graze or drive or drift or allow to drift or herd cattle or horses in a greater number than said defendants shall have permission, consent or authority from plaintiff and the Indians of the Blackfeet Indians Reservation to do, and denies that defendant trespassed upon said lands and premises. Further answering said paragraph this defendant denies that he is either insolvent or unable to respond in damages to the plaintiff and its Indian wards and denies that a multiplicity of suits or any suit or suits will be necessary to protect and enforce the rights of the plaintiff and its Indian Wards in the said lands and premises unless an injunction can be obtained to protect said lands and premises. Save and except as hereinabove or hereinafter admitted or qualified this defendant denies the allegations of said paragraph VII.

VII.

Save and except as in this answer admitted or qualified defendant denies the allegation of paragraph VII of said complaint.

VIII.

Admits the allegation of paragraph IX of said complaint.

IX.

Denies the allegation of paragraph X of plaintiff's complaint. [29]

SECOND

Further answering the complaint of the plaintiff this answering defendant alleges as follows, to-wit:

I.

That on or about the first day of November 1940 the plaintiff made and entered into a written agreement with this answering defendant and one Fred Chouquette designated "Grazing Permit" and which agreement was and is generally known and referred to by the plaintiff and permittees grazing livestock upon the Blackfeet Indian Reservation as an "on and off grazing permit" and that under the terms and provisions of said written agreement the plaintiff, in consideration of the payment to the said plaintiff of the sum of \$276.00 payable on November 1, 1940 the sum of \$500.52 payable during the year of 1941 and \$552.00 payable during the year 1942 granted unto this defendant and said Fred Chouquette the express *and* right to graze and herd upon certain lands embracing approximately 5780 acres, described in paragraph IV of the complaint for the period commencing November 1, 1940 and ending April 30, 1943 and that said written agreement contemplated a grazing period of twelve months during each year and that it is and has been the recognized custom and practice

for more than twenty years last past by and between the plaintiff and by the permittees of the plaintiff grazing livestock on said Indian Reservation under agreements of the aforementioned character, that, under such an agreement permittees in lieu of grazing livestock upon the lands described during a continuous twelve month period of the maximum number of livestock specified in the agreement in any one year might graze and had the absolute right to graze a greater number of livestock for a shorter period on such land and the increased number to be grazed for a shorter period was and is to be computed by adding to the number of livestock specified in the permit accordingly as the period of actual grazing in the year [30] bears to the total period of one year. To illustrate the method adopted, if the permittee grazed the land in the permit for a ten month period only then he would be entitled to increase the number of livestock specified in the permit during said ten month period in the proportion the two months not grazed bore to the twelve month period or any increase of $\frac{1}{6}$ of the number of livestock specified to be grazed for the twelve month period. That during the year of 1941 the defendant had the right, under said permit to graze a total of 510 head of livestock for a six month period and that defendant intended to graze and did actually graze livestock not to exceed 309 in number upon said land for a period of not more than six months during the year 1941. That at no time did defendant knowingly graze or

permit to graze or drive or permit to drive, herd or permit to herd, pasture or permit to pasture, feed or permit to feed an excess of 255 head of cattle, or the equivalent thereof as in this paragraph hereinbefore stated. That during said period the said defendant had other lands in his possession and control for the pasturing, grazing, and feeding of livestock and that if at any time any livestock in the possession of defendant, and pastured on other lands, grazed or pastured or fed or drifted or were herded upon the land described in the complaint same was done without the knowledge of this defendant and in any event the number of such livestock added to the 309 head hereinabove mentioned would be less than the number defendant had the right to pasture and graze upon the land described in the complaint.

THIRD

Further answering the complaint of the plaintiff this defendant alleges:

I.

That all of the land described in paragraphs IV and V of plaintiff's complaint are open unfenced lands chiefly suitable [31] for livestock grazing purposes.

II.

That he is a member of the Blackfeet Indian Tribe and entitled to and has the absolute vested right, in common with all the members of the Blackfeet Indian Tribe, to permit cattle, horses and other

livestock individually owned by members of such tribe to roam at large and graze upon all unfenced lands situate within the exterior boundaries of the lands embraced within the area of land known generally as the Blackfeet Indian Reservation.

III.

That such right in each and all members of the Blackfeet Indian Tribe was recognized by plaintiff and accorded to the Blackfeet Tribe by the Treaty entered into between the plaintiff and the said Blackfeet Indian Tribe in the year 1855 and that during all of the period from the time of the making of aforesaid Treaty the members of the Blackfeet Tribe have interpreted, and believed, such Treaty conferred such rights upon the members of said Tribe and have accordingly exercised such right with the knowledge and consent of the plaintiff and the members of such Tribe and are now exercising such right with full knowledge of plaintiff. That defendant is informed and believes and therefore alleges that the institution of the within suit is the first time that such right has ever been attempted to be denied to an Indian of said Blackfeet Indian Tribe and further alleges on information and belief that members of the Blackfeet Indian Tribe generally are exercising aforesaid right with the knowledge and acquiescence of the plaintiff.

FOURTH

Further answering plaintiff's complaint this answering defendant alleges:

I.

That from time immemorial there has existed among the Indians [32] of the Blackfeet Indian Tribe the long and well established custom of each member of said tribe having the absolute vested right, of allowing livestock, owned by such member to roam at large and graze upon the lands to which the said tribe claimed the right of occupancy, and exercising such right freely without interference by said tribe or by any member thereof. That said custom has for time immemorial been at all times recognized and observed by the said tribe and the members thereof as being one of the laws of the tribe binding upon the members of the tribe collectively and individually and that the defendant as an Indian member of the Blackfeet Indian Tribe has the right and is entitled to permit his livestock to roam and range at large and graze upon the open unfenced lands embraced within the interior boundaries of the Blackfeet Indian Reservation described in paragraph III of plaintiff's complaint, and such right is a valuable incorporeal property right owned and possessed by said defendant and the exercise of which is guaranteed to him under the constitution, treaties and laws of the United States.

Wherefore defendant prays judgment that plaintiff's complaint be dismissed and that judgment be entered in favor of defendants.

E. J. McCABE

Liberty Theater Building

Great Falls, Montana

Attorney for Defendant Brian
Connolly

[Endorsed]: Filed Oct. 19, 1942. [33]

Thereafter, on October 28, 1942, a Motion to Strike was duly filed herein, in the words and figures following, to-wit: [34]

[Title of District Court and Cause.]

MOTION TO STRIKE

Come Now the above-named Plaintiff, the United States of America, by and through the undersigned, its attorney of record herein, and respectfully moves the Court to strike matters contained in the amended answer of Brian Connolly, one of the above-named defendants, on filed herein as follows, to-wit:

1. From, including and after the words "and it is and has been the recognized custom," appearing at the end of line 20 and the beginning of line 21 of paragraph I of the defendant's further answer to the complaint of the plaintiff on page 4 of said amended answer of the defendant, Brian Connolly, down to and including the words and figures

“for a period of not more than six months during the year 1941.”, on line 12 of paragraph I on page 5, upon the grounds that said matter is immaterial; and

2. From, including and after the words “That during said period the said defendant”, on line 17 of paragraph I on [35] page 5 of said amended answer, down to and including the word “complaint”, on line 26 of paragraph I on page of said amended answer, upon the grounds that said matter is immaterial; and

3. All of paragraphs number II and III of the defendant’s further answer to the complaint of the plaintiff appearing on page 6 of said answer, upon the grounds and for the reason that said matter is:

(a) immaterial

(b) impertinent; and

4. All of paragraph numbered I of the defendant’s further answer to the plaintiff’s complaint starting on page 6 of defendant’s said answer and continuing through line 18 on page 7 thereof, upon the grounds that said matter is:

(a) redundant

(b) immaterial

(c) impertinent

And the Plaintiff, the United States of America, prays the Court for such other and further relief in the premises as may be just, with its costs.

Dated this 27th day of October, 1942.

ROY F. ALLAN

Assistant Attorney of the United States, in and
for the District of Montana.

Attorney for the Plaintiff.

[Endorsed]: Filed Oct. 28, 1942. [36]

Thereafter, on April 16, 1943, an Order Sustaining Motion to Strike was duly entered herein, in the words and figures following, to-wit: [37]

[Title of District Court and Cause.]

ORDER ENDORSED ON BACK OF MOTION
TO STRIKE FROM AMENDED ANSWER

The motion in the within entitled cause came on regularly for consideration. Apparently the matters offered in defense and sought to be eliminated by plaintiff relate to Treaties, Statutes and Customs, either not now in force or not in issue so far as the allegations of the complaint are concerned, and the Statutes and Regulations supporting them, and upon which such allegations are based. The Court being duly advised and good cause appearing therefor the said Motion to Strike is hereby sustained.

CHARLES N. PRAY,
Judge

Entered April 16, 1943. [38]

Thereafter, on June 28, 1943, a Petition and Stipulation for Modification or Injunction was duly filed herein, in the words and figures following, to-wit: [39]

[Title of District Court and Cause.]

PETITION FOR MODIFICATION OF
INJUNCTION

To the Honorable Charles N. Pray:

Your petitioners Brian Connolly and Daniel Connolly the defendants in the above entitled action by and through the undersigned E. J. McCabe their attorney of record respectfully petitions your Honorable Court and represents as follows:

That your petitioner Brian Connolly is the owner of a stock grazing permit upon certain lands located on the Blackfeet Indian Reservation within the State of Montana and that heretofore your petitioner Brian Connolly applied to the United States Forestry Department and the Interior Department and office of Indian Affairs for a grazing permit to be issued to said petitioner Brian Connolly to Sections 1, 2, 3, and 4 Township 34 North Range 9 West of the M.P.M. and that final action on said application for permit was deferred by reason of the fact that the aforesaid Section 3 T. 34 N. Range 9 West was included in an injunction heretofore issued in the above entitled action under date of December 11, 1941 and that your petitioner can obtain the said grazing permit upon the lands applied for as aforesaid if the court will modify the above mentioned injunction as to exclude said Section 3

from prospective and future operations and effect thereof,

That the United States District Attorney for the District of [40] Montana in compliance with the consent of the United States Indian Agent, F. H. McBride, at Browning Montana and the Forestry said injunction to enable your said petitioner to Department, has signed a written stipulation consenting to the modification of the said injunction which stipulation is hereto annexed and hereby incorporated in and made a part of the within petition.

Wherefore your petitioner respectfully prays an order of your Honorable Court modifying aforesaid injunction to exclude Section 3 Township 34 North Range 9 West from the prohibition contained in obtain grazing permit upon the lands hereinabove set forth and described and for such other relief as may be meet in the premises.

E. J. McCABE

Attorney for Defendants. [41]

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated and agreed by and between the undersigned attorneys of record for the plaintiff and defendants in the above entitled action that the petition of Brian Connolly and Daniel Connolly for modification of the injunction in the above entitled action and to which petition the within stipulation is hereto annexed, be allowed and granted by the court and that said injunction be modified as

to exclude Section 3 Township 34 North Range 9 West M.P.M. from the future and prospective operations and effects of the injunction.

Dated this 26th day of June 1943.

JOHN B. TANSIL

United States District At-
torney for the District of
Montana.

by ROY F. ALLAN

Asst U. S. Attorney
Attorney for Plaintiff

E. J. McCABE

Attorney for Defendants.

[Endorsed]: Filed June 28, 1943. [42]

Thereafter, on June 28, 1943, an Order Modifying Injunction was duly filed and entered herein, in the words and figures following to-wit: [43]

[Title of District Court and Cause.]

ORDER MODIFYING INJUNCTION

Upon reading and filing the petition of the above named defendants praying for an order of the court modifying the injunction, heretofore issued and filed in the above entitled action, and the stipulation of the parties to said action consenting to the modification of the injunction as petitioned for by said defendants and the court being duly advised:

It Is Hereby Ordered that the preliminary In-

junction heretofore issued in the above entitled action on the 11th day of December 1941 be and same is hereby modified to eliminate from the future and prospective restrictive operation of said injunction the following described tract of land only, situate in Glacier County, Montana to-wit:

Section Number 3, Township 34, North
Range 9 West Montana Principal Meridian;

to enable the defendant Brian Connolly to have issued to him by the proper authorities of the United States, a grazing permit embracing said particularly described tract of land and other lands.

Done this 28th day of June, 1943.

CHARLES N. PRAY

Judge.

[Endorsed]: Filed and Entered: June 28, 1943.

[44]

Thereafter, on October 29, 1943, the Decision of Court was duly filed herein, in the words and figures following to-wit: [45]

In the District Court of the United States in
and for the District of Montana

No. 305

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BIRAN CONNOLLY and DANIEL CONNOLLY,
Defendants.

DECISION OF COURT

The plaintiff seeks injunctive relief and damages in the above entitled cause against the defendants,, who are Indian wards of the plaintiff and members of the Blackfeet Tribe of Indians, for unlawful trespass by defendants' livestock on certain allotted Indian lands of the Blackfeet Indian Reservation, in Montana.

Plaintiff contends that defendants have "no right to trespass upon the allotted Indian lands of their less ambitious and less fortunate fellow tribesmen in violation of the rules and regulations that have been established by the Secretary of the Interior, in accordance with the act of Congress."

The Court has considered the evidence in this case and is of the opinion that there can be no question that the material allegations of the complaint have been sustained by clear and convincing proof in respect to a wilful trespass by the defendants in repeatedly permitting their livestock to graz on the lands of their neighbors. That the Secretary of the Interior has ample authority to

make rules regulating the grazing of livestock on an Indian Reservation is found in the Act of Congress of June 18, 1934 (48 Stat. 986; 25 U.S.C.A. 466) wherein it is provided as follows: "The Secretary of the Interior is directed to make rules and regulations for the operation and management of Indian forestry units on the principle of sustained yield management, to restrict the number of livestock grazed on Indian range units to the estimated carrying capacity of such ranges, and to promulgate such other rules and regulations as may be necessary to protect the range from deterioration, to prevent soil erosion, to assure full utilization of the range, and like purposes."

Counsel for the government has set forth the pertinent rules and regulations adopted and promulgated by the Secretary of the [46] Interior pursuant to authority conferred by the statute above quoted, and they appear to be fair and reasonable and well within the scope of the statute.

While there are some discrepancies in the testimony of the witnesses as contended by counsel for defendants, there is sufficient credible testimony to satisfy the court that the defendants have been trespassing as alleged in open violation of the statute and regulations, resulting in damage to the property of others, although warned by the Government representatives on the reservation to desist. That the attitude and intent of the defendant, Brian Connolly is clearly shown in his violation of the temporary injunction issued by this court in this cause. On many occasions the witnesses observed the Con-

nolly horses and cattle in trespass both before and after the commencement of this suit. The evidence shows that his livestock scattered for a distance of ten to twelve miles from his range unit. His explanation was that the cattle had strayed, and in answer to a question in that respect replied that they had always done that. To show conditions as they existed about the time this case was tried, Mr. Stephenson, a government representative, testified that on May 3rd, 1943, a few days before the trial, he had observed 16 head of horses and 3 cows in trespass.

The only question now with which the court is particularly concerned and raised by defendants' counsel is whether the evidence is sufficiently definite and certain as to the specific damages alleged, such as damage to grasses and other feed and forage and herbage growing on said lands and whether a penalty can be imposed under the pleadings and in view of the ruling in *U. S. v. Ash Sheep Co.* (D. C. Mont.) 252 U. S. 157, 170, relied upon by defendants' counsel, to the effect that a court in granting equitable relief will not add the collection of a penalty, an action for the statutory penalty being one strictly at law in which the defendants would have the right of trial by jury; that in the present case the defendants went to trial on the plaintiff's theory that the action was primarily equitable with compensatory damages as incidental and under that theory waived the right to have a jury pass on the issue of compensatory damages; that there is nothing in the complaint suggesting

the recovery of any penalty, the prayer [47] being for injunction, compensatory damages, and such "other and further relief as may seem meet and equitable." Counsel now claims that by the complaint having led the defendants to believe the plaintiff did not seek recovery of a penalty, plaintiff would not be permitted to change the theory to the prejudice of the defendants.

In reply to the argument of defendants that they have been deprived of the right of trial by jury, Rule 38 of the Rules of Civil Procedure provides for trial by jury of any issue triable of right by jury, and the failure of a party to serve a demand as required by this rule and to file it as required by Rule 5 (d) constitutes a waiver by him of trial by jury. From a perusal of the allegations of the complaint it appears that the statutory provisions upon which plaintiff could rely for recovery are suggested by the facts alleged although no specific reference is made to the recovery of a penalty as provided in Section 179 of Title 25 U. S. C. A. Plaintiff in the brief contends that this section is one of the controlling factors of the measure of damages in the case and contributes such penalty in addition to the actual damages suffered by the Indian allottees. Rule 8 (e) 2 provides that: " * * * * * A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11."

In the Ash case, *supra*, cited by defendants, the court held: "While the amount of the statutory penalty for the trespass was prayed for in the equity suit, yet the trial court, saying that equity never aids the collection of such penalties, *Marshal v. Vicksburg*, 15 Wall. 146, 149, and that no evidence of substantial damage had been introduced, limited the recovery to one dollar and costs * * *." Here the claim of penalty was based upon trespass by sheep on Indian lands under Sec. 2117 Revised Statutes of the United States, and was recovered in an action at law, filed subsequent to the equity suit.

As will be noted the rule provides that a party may state as many claims as he has, and here the claims and facts alleged and established show the number of livestock in trespass, clearly indicating the application of the above section as a penalty, although [48] the prayer does not mention it in so many words. Under the rules and their interpretation by the courts counsel for the defendants could have had a jury on the questions of damages and penalty if they had fully considered what provisions of the statutes and regulations might be invoked by plaintiff, if the facts alleged were proven. Under the practice established by the rules of civil procedure there is no distinction between actions at law and suits in equity. To permit the imposition of a penalty it is not necessary to consider whether this case should have been begun originally as a law action or as a suit in equity, and, it does not appear that it would make any difference whether counsel

had specifically demanded in the complaint the remedies to which plaintiff would be entitled. The court should grant the relief to which a party is entitled even though demand for such relief has not been made in the pleadings. (Rule 54 (c), 28 U. S. C. A. following Sec. 723c).

As it seems to the court, whether the complaint in this action is regarded as an action at law, with equitable relief incidentally prayed for, or whether the complaint be considered as an action at law and a suit in equity joined, the parties are, as a matter of right, entitled to a trial by jury on all legal issues raised, if demand for a jury is made as the rules provide. *Fitzpatrick v. Sun Life Assurance Co.*, 1 F. R. D. 713; *Ransom, et al vs. Staso Milling Co.*, 2 F. R. D. 128.

Consequently, having considered the arguments of counsel, the law and the proof, the court is now of the opinion that a penalty of \$258, as prayed for, should be imposed against the defendants, with costs in favor of plaintiff, and that One Dollar in addition thereto should be assessed as nominal damages, because of insufficiency of proof as to specific items of damage as alleged in the complaint, also that the temporary injunction heretofore issued be made permanent, and it is so ordered.

Findings and Conclusions and form of Judgment in conformity herewith, may be submitted.

CHARLES N. PRAY

Judge

[Endorsed]: Filed Oct. 29, 1943.

Thereafter, on December 20, 1943, the Findings of Fact and Conclusions of Law was duly filed herein, in the words and figures following, to-wit: [50]

[Title of District Court and Cause]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Cause Came On Regularly for trial before the Court, sitting without a jury, at Great Falls, Montana, on Thursday, May 6, 1943, the Honorable Charles N. Pray, Judge of the District Court of the United States, in and for the District of Montana, presiding—a jury trial having been waived by the parties, under and by virtue of the provisions of Rule 38(d) of the Rules of Civil Procedure for the District Courts of the United States, in that no demand for a trial by jury of any issue triable of right by a jury was made in writing or endorsed upon a pleading by any of the parties to said action. Roy F. Allen, Assistant Attorney of the United States, in and for the District of Montana, appearing for the plaintiff, and E. J. McCabe, Esquire, appearing as the attorney for the defendants. The Court having heard the testimony and having examined the proofs offered by the respective parties, and the cause having been argued by the respective parties, and briefs having been submitted by the respective parties, and the case being submitted to the Court for decision, and after deliberating thereon, and being fully advised in the premises, the Court finds the facts as follows: [51]

FINDINGS OF FACT

I.

That the District Court of the United States, in and for the District of Montana, has jurisdiction herein, for the reason that the United States of America is the party plaintiff.

II.

That each and every allegation contained in Paragraphs II, III and IX of the plaintiff's complaint is true.

III.

That it is true that the defendants, Biran Connolly and Daniel Connolly, are, one and both, Indian persons, wards of the government of the United States and under the charge of the Superintendent in charge of the Blackfeet Indian Reservation, in the State and District of Montana; and that the defendant, Biran Connolly, was entitled to specific grazing rights and privileges on the Blackfeet Indian Reservation at the time of the filing of the plaintiff's complaint herein, on certain lands and premises on said Blackfeet Indian Reservation as more particularly described in Paragraph IV of the plaintiff's complaint on file herein; but that said lands and premises, on which the defendant, Biran Connolly, had said grazing rights and privileges, were in no wise involved in or made the subject of this action.

IV.

That for many months prior to and including the date of the filing of the plaintiff's complaint, the defendants, Biran Connolly and Daniel Connolly,

willfully drove and otherwise conveyed livestock of horses and cattle and willfully caused and allowed their said livestock to range and feed on lands and premises belonging to their Indian neighbors on said Blackfeet Indian Reservation and to trespass on the lands of thier said Indian neighbors on said [52] Blackfeet Indian Reservation, without the consent of said Indians, and in open defiance of the plaintiff, its officers and agents, and without said defendants ever having had at any said time any permit or other right or authority whatsoever to drive and herd, or otherwise convey, said livestock of said defendants on and upon said Indian lands and premises of the Blackfeet Indian Reservation.

V.

That the defendants are subject to the penalty provided for by Section 179, Title 25, United States Code, in the amount of \$1.00 per head for the livestock of said defendants that said defendants drove and conveyed to range and feed on the lands and premises belonging to their Indian neighbors on said Blackfeet Indian Reservation without the consent of said Indians, as follows, to-wit: the 25 head of horses in willfull trespass on July 25, 1941, the 48 head of horses and the 25 head of cattle in such trespass on August 6, 1941, the 25 head of horses and 45 head of cattle in willfull trespass on August 8, 1941, the 32 head of horses in such trespass on August 13, 1941, and the 36 head of horses and 22 head of cattle in willfull trespass on October 21, 1941—making the total penal sum of \$258.00.

VI.

That it is true that the defendants, Biran Connolly and Daniel Connolly, one and both, willfully refused to remove their trespassing cattle and horses from the lands and premises of their Indian neighbors on said Blackfeet Indian Reservation, and said defendants willfully continued to allow their said livestock to trespass upon said lands and premises, and said defendants per- [53] mitted their said livestock to eat and destroy the grasses, feed, herbage and other forage growing thereon, and to trample and destroy the same, and said defendants, one and both, refused to remove their said livestock when requested and upon the instructions of authorized officers of the United States Indian Service, when injury was being done to the range of said Blackfeet Indian Reservation, by reason of the improper handling of said livestock by said defendants, and said defendants would not remove their said livestock from said Indian lands and premises of said Blackfeet Indian Reservation until compelled so to do.

VII.

That the plaintiff, by reason of the foregoing, has no plain, adequate and complete remedy at law herein against the repeated trespassing of the defendants and no remedy whatsoever, save on the equity *said* of this Court, where such willfull trespasses are cognizable.

CONCLUSIONS OF LAW

From the foregoing facts, the Court concludes, as its conclusions of law:

1. That the plaintiff is entitled to judgment in the amount of \$258.00 for the penalty provided by Section 179, Title 25, United States Code, for the willfull driving and otherwise conveying stock of horses and cattle, and the willfull causing and allowing of said livestock to range and feed on the lands and premises belonging to Indians and the willfull trespassing of the livestock of said defendants on the lands of their Indian neighbors on said Blackfeet Indian Reservation, without the consent of said Indians.

2. That the plaintiff is entitled to judgment, against the above-named defendants, in the amount of \$1.00 for nominal damages [54] for the trespassing of the defendants' livestock on said lands and premises of the Blackfeet Indian Reservation.

3. That the plaintiff is entitled to judgment, against said defendants, for its cost of action herein laid out and expended.

4. And, that the plaintiff is further entitled to have a perpetual injunction issued against the above-named defendants, one and both, and all their agents, servants, employees, attorneys and lessees, and all others acting in aid of or assistance of said defendants, or either of them, and all those in active concert or participating with said defendants, or either of them, forever restraining and absolutely enjoining them, or either of them, or any of them,

from driving, drifting, allowing to drift, herding, or conveying any livestock whatsoever, on or upon, or permitting the same to be driven, drifted, or allowed to drift, herded or conveyed, or pastured or grazed, or fed on or upon, or otherwise interfering with the possession, use or enjoyment of the plaintiff and its Indian wards on any of the lands and premises, or any part thereof, more particularly described as follows, to-wit:

Sections 23, 24, 25, 26, 27, 34 and 35, in Township 35 North, Range 10 West, Montana Principal Meridian; Section 10, Township 34 North, Range 9 West, Montana Principal Meridian; Sections 11 and 14, Township 35 North, Range 9 West, Montana Principal Meridian; Sections 20 and 21, Township 35 North, Range 9 West, Montana Principal Meridian; Southwest Quarter of the Northwest Quarter of Section 22, Township 34 North, Range 9 West, Montana Principal Meridian; Sections 16 and 21, Township 35 North, Range 9 West, Montana Principal Meridian; North Half of Section 11, Township 35 North, Range 9 West, Montana Principal Meridian; and South Half Section 11, Township 35 North, Range 9 West, Montana Principal Meridian;

All Done and Dates, at Billings, Montana, this 20th day of December, 1943.

CHARLES N. PRAY

Judge of the District Court
of the United States, in and
for the District of Montana

Due and personal service of the within and foregoing Findings of Fact and Conclusions of Law made and admitted and the receipt of a true copy thereof acknowledged this 7th day of December, 1943.

E. J. McCABE

Attorney for the Defendants.

By NINA SUNDQUIST

Stenograhepr

[Endorsed]: Filed Dec. 30, 1943.

Thereafter, on December 24, 1943, a Judgment was duly filed and entered herein, in the words and figures following, to-wit: [57]

In the District Court of the United States

In and for the District of Montana

Great Falls Division

Civil Action, File No. 305

UNITED STATES OF AMERICA,

Plaintiff,

v.

BIRAN CONNOLLY, and

DANIEL CONNOLLY,

Defendants.

JUDGMENT

Be it Remembered: That the above-entitled

cause came on regularly for trial before the court, sitting without a jury, at Great Falls, Montana, on Thursday, the 6th day of May, 1943, the Honorable Charles N. Pray, Judge of the District Court of the United States, in and for the district of Montana, presiding. A jury trial having been waived by the parties, under and by virtue of the provisions of Rule 38 (d) of the Rules of Civil Procedure for the District Courts of the United States, in that no demand for a trial by jury of any issue triable of right by a jury was made in writing or endorsed upon a pleading by any of the parties to said action. Roy F. Allan, Assistant Attorney of the United States, in and for the district of Montana, appearing as the attorney for the plaintiff, and E. J. McCabe, Esquire, appearing as the attorney for the defendants. The plaintiff having commenced its action against the defendants for a preliminary and permanent injunction requiring said defendants to refrain from certain actions in its complaint on file herein and [58] hereinafter more particularly set forth, and for damages against said defendants, and a preliminary injunction having been heretofore, by order of this Court, duly given, made and entered in said cause on the 16th day of December, 1941, after a hearing upon notice to show cause; both the plaintiff and the defendants having submitted evidence before the court, argues said cause orally, and submitted written briefs thereon, for the consideration of the Court; and the Court being fully advised in the premises both as to the law and the facts, and hav-

ing filed its written decision herein and its findings of fact and conclusion of law, and having directed that judgment be entered in accordance therewith;

Now, Therefore, it is Hereby Ordered, Adjudged, and Decreed, by the Court, and the Court does hereby order, adjudge and decree:

(1) That a permanent injunction issued out of this Court, addressed to the defendants, Biran Connolly and Daniel Connolly, one and both, and all of their agents, servants, employees, attorneys and lessees, and all others acting in aid of or assistance of them, or of either of them, and all those in active concert or participating with them, or either of them, forever restraining and absolutely enjoining them, or either of them, or any of them, from driving, drifting, allowing to drift, herding, or conveying any livestock whatsoever, on or upon, or permitting the same to be driven, drifted, or allowed to drift, herded or conveyed, or pastured, or grazed, or fed, on or upon the land and premises hereinafter described, or otherwise interfering with the possession, use, and *enjoinder* of the plaintiff and its Indian wards of any of said lands and premises, or any part thereof, which said lands and premises are now more particularly described as follows, to-wit:

Sections 23, 24, 25, 26, 27, 34 and 35 in Township 35 North, Range 10 West, Montana Principal Meridian; Section 10, Township 34 North, Range 9 West, Montana Principal Meridian; Sections 11 and 14, Township 35 North, Range 9 West, Montana Principal Meridian; Sections 20 and 21, Township 35 North, Range 9 West,

Montana [59] Principal Meridian; Southwest Quarter of the Northeast Quarter of Section 22, Township 34 North, Range 9 West, Montana Principal Meridian; Sections 16 and 21, Township 35 North, Range 9 West, Montana Principal Meridian; North Half of Section 11, Township 35 North, Range 9 West, Montana Principal Meridian; and South Half Section 11, Township 35 North, Range 9 West, Montana Principal Meridian;

(2) That the plaintiff is entitled to judgment against the defendants, Biran Connolly and Daniel Connolly, in the amount of \$258.00 for the penalty provided by Section 179, Title 25, United States Code, for the willful driving and otherwise conveying stock of horses and cattle, and the willful causing and allowing of said livestock to range and feed on the hereinbefore described lands and premises belonging to Indians and the willful trespassing of the livestock of said defendants on the lands of their Indian neighbors on said Blackfeet Indian Reservation, as hereinbefore described, without the consent of said Indians.

(3) That the plaintiff is entitled to judgment, against the above-named defendants, in the amount of \$1.00 for nominal damages for the trespassing of the defendants livestock on said lands and premises of the Blackfeet Indian Reservation, as hereinbefore more particularly described.

(4) That the plaintiff is entitled to judgment, against said defendants, for its cost of action herein laid out and expended.

All Done In Open Court, this 24th day of December, 1943.

CHARLES N. PRAY,

Judge of the District Court
of the United States, in and
for the District of Montana.

[Endorsed]: Filed and Entered Dec. 24, 1943.

[60]

Thereafter, on December 24, 1943, a Notice of Entry of Judgment was duly filed herein, in the words and figures following, to-wit: [61]

[Title of District Court and Cause.]

NOTICE OF ENTRY OF JUDGMENT

To Biran Connolly and Daniel Connolly, the above-named defendants, and to E. J. McCabe, their attorney of record herein:

Notice Is Hereby Given and you and each of you will hereby take notice that a judgment on the decision of the Court and its Findings of Facts and Conclusions of law, in the above-entitled cause, was made, rendered and entered on said cause on the 24th day of December, 1943, a true copy of which said judgment is here served upon you and made a part hereof.

Please govern yourselves accordingly.

Dated this 24th day of December, 1943.

ROY F. ALLAN

Assistant Attorney of the
United States, in and for
the District of Montana.

[62]

AFFIDAVIT OF MAILING

United States of America
State and District of Montana
County of Yellowstone—ss.

Nadine Malmin, being first duly sworn upon her oath, deposes and says: That she is a citizen of the United States and a resident of the State of Montana, and is over the age of eighteen years, and not a party to or interested in the above-entitled action; that she is a stenographer in the office of the Attorney of the United States for the District of Montana, Attorney for the plaintiff named in the hereto attached Notice of Entry of Judgment; and that said Attorney resides and has his office at Billings, Montana; that E. J. McCabe, attorney for the defendants Biran Connolly and Daniel Connolly, resides and has his office at Great Falls, Montana; that there is a regular communication by United States mail between Billings, Montana, and Great Falls, Montana; that on the 24th day of December, 1943, this affiant deposited in the United States Post Office at Billings, Montana, a true and correct copy of the foregoing Notice of Entry of Judgment, enclosed in an envelope securely sealed, addressed to Mr. E. J. McCabe, Attorney at Law,

Great Falls, Montana, the attorney for the defendants, at Great Falls, Montana, and sent the same under Government frank, being the official frank of the United States Attorney for the District of Montana, no postage thereon being required for the transmittal thereof.

NADINE MALMIN

Subscribed and sworn to before me this 24th day of December, 1943.

[Seal]

ROY F. ALLAN

Notary Public for the State
of Montana, residing at
Billings, Montana.

My commission expires June 29, 1944.

[Endorsed]: Filed Dec. 24, 1943. [63]

Thereafter, on December 31, 1943, a Notice of Intention of defendant Brian Connolly to Move for a New Trial and Motion for New Trial was duly filed herein, in the words and figures following, to-wit: [64]

[Title of District Court and Cause.]

NOTICE OF INTENTION OF BRIAN CON-
NOLLY TO MOVE FOR A NEW TRIAL.

To The Plaintiff Above Named and to John B. Tansil, Esq., United States District Attorney, attorney for plaintiff:

You and each of you will please take notice that

on the 20th day of January, 1944, at 10 o'clock in the forenoon or as soon thereafter as counsel can be heard, at the courtroom of the above entitled court in the Federal Building in the city of Great Falls, Cascade County, Montana, the above named defendant, Brian Connolly, by E. J. McCabe his attorney, intends to move the court to vacate and set aside the findings of fact and conclusions of law heretofore made and filed in the above entitled cause, and the judgment heretofore rendered and entered thereon, and to grant a new trial of the above entitled action to said named defendant. Said motion will be made upon all of the files, records, and proceedings and the minutes of the court in said action and upon affidavits and will be made upon the following grounds and reasons, to wit:

[65]

1. Irregularity in the proceedings of the court, and orders of the court, and abuse of discretion, by which defendant was prevented from having a fair trial.

2. Accident or surprise, which ordinary prudence could not have guarded against;

3. Insufficiency of the evidence to justify the findings of fact and conclusions of law of the court.

4. Insufficiency of the evidence to justify the decision of the court.

5. Insufficiency of the evidence to justify the judgment rendered and entered in said cause.

6. That the findings of fact and conclusions of law made by the court in said cause are against law.

7. The decision of the court in said cause is against law.

8. The judgment made and entered in said cause is against law.

9. Errors in law occurring at the trial and excepted to by the defendant.

A copy of said proposed motion to be filed and made in said cause is herewith delivered to and served upon you.

E. J. McCABE

Attorney for defendant Brian
Connolly. [66]

[Title of District Court and Cause.]

MOTION OF BRIAN CONNOLLY
FOR A NEW TRIAL

And Now, the above named defendant, Brian Connolly, by his attorney, E. J. McCabe, moves the court to set aside and vacate the findings of fact and conclusions of law heretofore made and filed in the above entitled cause, and to vacate and set aside the judgment heretofore rendered and entered in said cause, and to grant the said named defendant a new trial of the said cause, and in support hereof the said named defendant assigns the following reasons:

1. Irregularity in the proceedings of the court and orders of the court and abuse of discretion by which defendant was prevented from having a fair trial in that the learned court erred in granting

the motion of plaintiff to strike from the amended answer of Brian Connolly filed in said action allegations of fact which appear in paragraph I pages 4 and 5, and paragraphs II and III on page 6, and paragraph I on pages 6 and 7 of said amended answer, whereby the said defendant was precluded from establishing defenses [67] which he had by treaty and custom as a member of the Blackfeet Indian Tribe and the defense of practical interpretation and recognition by the plaintiff of the existence of the vested right of grazing livestock on Blackfeet Tribal Lands in members of said tribe.

2. Accident and surprise which ordinary prudence could not have guarded against, in that the complaint in the action sought injunctive relief and incidental compensatory damages without any claim for assessment of any penalty against the defendants and in reliance upon the allegations of the complaint as being wholly in the nature of an action in equity in which defendants would not be entitled to a jury trial, and being led to believe by such allegations and the prayer for relief that no punishment of defendants by way of a penalty was or would be sought. This defendant did not ask for a jury trial on the question of assessment of a penalty and said defendant was informed by his attorney that since the question of a penalty being imposed was not an issue in the case, defendant was not entitled to ask for a jury trial as a matter of right, and by reason thereof, defendant did not request a jury trial of any of the issues of the action.

3. Insufficiency of the evidence to justify either

the decision of the court or the findings of fact of said court to the effect that defendants willfully caused or willfully permitted their cattle and horses to be driven upon or grazed upon any lands upon which said cattle and horses were not entitled to be grazed, and to the effect that defendants are subject to a penalty provided for by section 179 Title 25 United States Code of \$1.00 per head for livestock driven and conveyed to range and feed on lands belonging to their Indian neighbors on the Blackfeet Indian Reservation in the penal sum of \$258.00, and;

Insufficiency of the evidence to justify the findings of fact numbered VI and VII made by the Court; and; [68]

Insufficiency of the evidence to justify the conclusions of law of the Court numbered 1, 2, 3, and 4, made in said cause.

4. Insufficiency of the evidence to justify the judgment of injunction in said cause and insufficiency of the evidence to justify the judgment for nominal damages of \$1.00 and insufficiency of the evidence to justify the judgment of \$258.00 as a penalty in that no actionable trespass was established by the evidence and no evidence warranting the imposition of a penalty in the sum of \$258.00.

5. That the findings of fact numbered IV, V, VI, and VII made by the court are against law and conclusions of law numbered 1, 2, 3, and 4 made by the Court are against law.

6. That the decision of the Court in said cause is against law.

7. That the judgment made and entered in said cause is against law.

8. Errors in law occurring at the trial and excepted to by the defendant as follows:

(a) The learned court erred further during the trial of said cause in sustaining the objection to the following questions propounded to witness Brian Connolly on direct examination, in view of the purposes stated at the time:

“Q. And during the time that you have been there residing and leasing these various units upon which you range your stock, do you know whether or not it has been the practice of residents of the Reservation to permit their stock to run at large?

Mr. Allan: We object to this. There is no such thing as custom. The Reservation is governed by regulations by the Secretary of the Interior and Indian Affairs. It has nothing to do with this case whatsoever.” (p. 89 Tr.)

“Q. Do you know whether or not there has been a custom among the Blackfeet Indians on the Blackfoot Reservation relative to running their stock at large on that Reservation?

Mr. Allan: Again renewing the objection. We object to any testimony as to custom because the matter is now covered by regulations.

The Court: I don't think that is an issue here. I think we threshed that out on your motion to strike.” (p. 91 Tr.) [69]

(b) The learned court further erred during the trial of said cause in sustaining the objection of

plaintiff to the following question propounded to witness Brian Connolly by his counsel:

“Q. Now, you have been examined on cross examination about a resolution relative to free grazing on the Blackfoot Indian Reservation. Will you please state whether or not that resolution, whether it passed or not, has been a subject of discussion with the Blackfeet Tribal Council?

A. Yes sir.

Mr. Allan: We object to such resolution. The resolution speaks for itself, and it is the best evidence.

The Court: Well, I think so. The resolution was passed first, and was revoked.

Mr. McCabe: We are going to show there was a dispute with some members of the Council; it was never adopted, and some said it was, and in order to obviate that question there was a resolution introduced repealing that resolution.

The Court: Objection sustained as the matter is going into the proceedings of the Council.” (p. 109 Tr.)

The within motion is made upon all the files, records, proceedings, and minutes of the court in said cause, and upon affidavits to be hereafter filed and served in support of the motion.

E. J. McCABE

Attorney for defendant Brian
Connolly. [70]

[Title of District Court and Cause.]

AFFIDAVIT OF MAILING

United States of America

State of Montana

County of Cascade—ss.

E. J. McCabe, being duly sworn upon his oath deposes and says:

That he is the attorney for defendant Brian Connolly in the above entitled action and that he resides and maintains his office at Great Falls, Cascade County, Montana, and that John B. Tansil, Esq., U. S. District Attorney for the District of Montana, is the attorney for the plaintiff in said cause and resides and maintains his office at Billings, Montana;

That on the 30th day of December, 1943, affiant deposited true and correct copies of the annexed notice of intention of Brian Connolly to move for a new trial and motion of Brian Connolly for a new trial in a securely sealed envelope, addressed to "John B. Tansil, Esq. U. S. District Attorney for the District of Montana, Billings, Montana," with postage thereon fully prepaid and deposited said envelope so addressed in the United States Post Office at [71] Great Falls, Montana, on the 30th day of December, 1943, for transmission and

delivery in regular course of mail to the said John B. Tansil, Esq. attorney for plaintiff.

E. J. McCABE

Subscribed and sworn to before me on the 31st day of December, 1943.

[Seal] G. C. RYAN

Notary Public for the State of Montana residing at Great Falls, Montana. My commission expires July 25, 1945.

[Endorsed]: Filed December 31, 1943. [72]

Thereafter, on December 31, 1943, a Notice of Intention of defendant Daniel Connolly to Move for a New Trial, and Motion for New Trial was duly filed herein, in the words and figures following, to-wit: [73]

[Title of District Court and Cause.]

NOTICE OF INTENTION OF DANIEL CON-
NOLLY TO MOVE FOR A NEW TRIAL

To The Plaintiff Above Named and To John B. Tansil, Esq., United States District Attorney, attorney for plaintiff:

You and each of you will please take notice that on the 10th day of January, 1944, at 10 o'clock in the forenoon or as soon thereafter as counsel can be heard, at the courtroom of the above entitled court in the Federal Building in the city of Great Falls, Cascade County, Montana, the above named

defendant, Daniel Connolly, by E. J. McCabe his attorney, intends to move the court to vacate and set aside the findings of fact and conclusions of law heretofore made and filed in the above entitled cause, and the judgment heretofore rendered and entered thereon, and to grant a new trial of the above entitled action to said named defendant. Said motion will be made upon all of the files, records, and proceedings and the minutes of the court in said action and will be made upon the following grounds and reasons, to wit: [74]

1. Irregularity in the proceedings of the court, and orders of the court, and abuse of discretion, by which defendant was prevented from having a fair trial.

2. Accident or surprise, which ordinary prudence could not have guarded against.

3. Insufficiency of the evidence to justify the findings of fact and conclusions of law of the court.

4. Insufficiency of the evidence to justify the decision of the court.

5. Insufficiency of the evidence to justify the judgment rendered and entered in said cause.

6. That the findings of fact and conclusions of law made by the court in said cause are against law.

7. The decision of the court in said cause is against law.

8. The judgment made and entered in said cause is against law.

9. Errors in law occurring at the trial and excepted to by the defendant.

A copy of said motion to be filed and made in said cause is herewith delivered to and served upon you.

E. J. McCABE

Attorney for defendant Daniel
Connolly. [75]

[Title of District Court and Cause.]

MOTION OF DANIEL CONNOLLY
FOR A NEW TRIAL.

And Now, the above named defendant, Daniel Connolly, by his attorney E. J. McCabe, moves the court to set aside and vacate the findings of fact and conclusions of law heretofore made and filed in the above entitled cause, and to vacate and set aside the judgment heretofore rendered and entered in said cause, and to grant the said named defendant a new trial of the said cause, and in support hereof the said named defendant assigns the following reasons:

1. Insufficiency of the evidence to justify either the decision of the court or the findings of fact of said court to the effect that defendants willfully caused or willfully permitted their cattle and horses to be driven upon or grazed upon any lands upon which said cattle and horses were not entitled to be grazed, and to the effect that defendants are subject to a penalty provided for by section 179 Title 25 United States Code of \$1.00 per head for

livestock driven and conveyed to range and feed on lands belonging to their Indian neighbors on the Blackfeet Indian Reservation in the penal sum of \$258.00, and;

Insufficiency of the evidence to justify the findings of fact numbered VI and VII made by the court, and; [76]

Insufficiency of the evidence to justify the conclusions of law of the Court numbered 1, 2, 3, and 4, made in said cause.

2. Insufficiency of the evidence to justify the judgment of injunction in said cause and insufficiency of the evidence to justify the judgment for nominal damages of \$1.00 and insufficiency of the evidence to justify the judgment of \$258.00 as a penalty in that no actionable trespass was established by the evidence and no evidence warranting the imposition of a penalty in the sum of \$258.00.

3. That the findings of fact numbered IV, V, VI, and VII made by the court are against law and conclusions of law numbered 1, 2, 3, and 4 made by the Court are against law.

4. That the decision of the court in said cause is against law.

5. That the judgment made and entered in said cause is against law.

6. Errors in law occurring at the trial and excepted to by the defendant as follows:

(a) The learned court erred further during the trial of said cause in sustaining the objection to the following questions propounded to witness

Brian Connolly on direct examination, in view of the purposes stated at the time:

“Q. And during the time that you have been there residing and leasing these various units upon which you range your stock, do you know whether or not it has been the practice of residents of the Reservation to permit their stock to run at large?

Mr. Allan: We object to this. There is no such thing as custom. The Reservation is governed by regulations by the Secretary of the Interior and Indian Affairs. It has nothing to do with this case whatsoever.” (P. 89 Tr.)

“Q. Do you know whether or not there has been a custom among the Blackfeet Indians on the Blackfoot Reservation relative to running their stock at large on that Reservation?

Mr. Allan: Again renewing the objection. We object to any testimony as to custom because the matter is now covered by regulations.

The Court: I don't think that is an issue here. I think we threshed that out on your motion to strike.” (p. 91 Tr.) [77]

(b) The learned court further erred during the trial of said cause in sustaining the objection of plaintiff to the following question propounded to witness Brian Connolly by his counsel:

“Q. Now, you have been examined on cross examination about a resolution relative to free grazing on the Blackfoot Indian Reservation. Will you please state whether or not that res-

olution, whether it passed or not, has been a subject of discussion with the Blackfeet Tribal Council?

A. Yes sir.

Mr. Allan: We object to such resolution. The resolution speaks for itself, and it is the best evidence.

The Court: Well, I think so. The resolution was passed first, and was revoked.

Mr. McCabe: We are going to show there was a dispute with some members of the Council; it was never adopted, and some said it was, and in order to obviate that question there was a resolution introduced repealing that resolution.

The Court: Objection sustained as the matter is going into the proceedings of the Council." (P. 109 Tr.)

The within motion is made upon all the files, records, proceedings, and minutes of the court in said cause.

E. J. McCABE

Attorney for defendant Daniel Connolly. [78]

[Title of District Court and Cause.]

AFFIDAVIT OF MAILING

United States of America

State of Montana

County of Cascade—ss.

E. J. McCabe, being fully sworn upon his oath deposes and says:

That he is the attorney for defendant Daniel Connolly in the above entitled action and that he resides and maintains his office at Great Falls, Cascade County, Montana, and that John B. Tansil, Esq., U. S. District Attorney for the District of Montana, is the attorney for the plaintiff in said cause and resides and maintains his office at Billings, Montana;

That on the 30th day of December, 1943, affiant deposited true and correct copies of the annexed notice of intention of Daniel Connolly to move for a new trial and motion of Daniel Connolly for a new trial, in a securely sealed envelope, addressed to "John B. Tansil, Esq. U. S. District Attorney for the District of Montana, Billings, Montana," with postage thereon fully prepaid and deposited said envelope so addressed in the United States Post Office at [79] Great Falls, Montana, on the 30th day of December, 1943, for transmission and delivery in regular course of mail to the said John B. Tansil, Esq. attorney for plaintiff.

E. J. McCABE

Subscribed and sworn to before me on this 31st day of December, 1943.

[Seal] G. C. RYAN

Notary Public for the State of Montana residing at Great Falls, Montana. My commission expires July 25, 1945.

[Endorsed]: Filed December 31, 1943. [80]

Thereafter, on January 10, 1944, the Affidavit of Brian Connolly in Support of Motion for New Trial was duly filed herein, in the words and figures following, to-wit: [81]

[Title of District Court and Cause]

AFFIDAVIT OF BRIAN CONNOLLY IN
SUPPORT OF MOTION FOR A NEW TRIAL

United States of America

State of Montana

County of Glacier—ss.

Brian Connolly, being first duly sworn upon his oath deposes and says: That he is one of the defendants named in the above entitled action and that he makes this affidavit in support of his motion for a new trial heretofore filed and served in the said action;

That prior to the time the above entitled action was set down for trial and at the time when he retained E. J. McCabe of Great Falls, Montana to act as his attorney in said action, he inquired of his said attorney as to whether he could have a

trial of said cause by a jury and was informed by his said attorney at that time that the above entitled action was an equitable action for injunctive relief with the claim for compensatory damages as relief incidental to the main relief sought by way of injunction, and that said action was of a character known and referred to generally as an equitable action in which defendants were not entitled to a jury trial, and that since no penalty or forfeiture by way of punishment was sought in the action that he could not obtain a separation of causes of action and a trial by jury. That affiant verily believed and verily believes the statement made by his attorney and that in reliance upon said statement affiant did not request that said action or any issue therein be tried by a jury, and that had affiant believed that the plaintiff would seek to recover a money penalty or a money [82] forfeiture in said action by way of punishment of this defendant, that affiant would have requested the issue of punishment to be submitted to a jury in said cause.

BRIAN CONNOLLY

Affiant

Subscribed and sworn to before me this 6th day of January, 1944.

(Seal)

S. J. RIGNEY

Notary Public for the State of Montana, residing at Cut Bank, Montana. My commission expires 2/6/45. [83]

[Title of District Court and Cause]

AFFIDAVIT OF MAILING

United States of America

State of Montana

County of Cascade—ss.

E. J. McCabe, being duly sworn upon his oath deposes and says:

That he is the attorney for defendant Brian Connolly in the above entitled action and that he resides and maintains his office at Great Falls, Cascade County, Montana, and that John B. Tansil, Esq., U. S. District Attorney for the District of Montana, is the attorney for the plaintiff in said cause and resides and maintains his office at Billings, Montana;

That on the 10th day of January, 1944, affiant deposited a true and correct copy of the annexed Affidavit of Brian Connolly in a securely sealed envelope, addressed to "John B. Tansil, Esq., U. S. District Attorney for the District of Montana, Billings, Montana," with postage thereon fully prepaid and deposited said envelope so addressed in the United States Post Office at Great Falls, Montana, on the 10th day of January, 1944, for transmission and [84] delivery in regular course of mail to the said John B. Tansil, Esq., attorney for plaintiff.

E. J. McCABE

Subscribed and sworn to before me on this 10th day of January, 1944.

(Seal) G. C. RYAN

Notary Public for the State of Montana, Residing at Great Falls, Montana. My commission expires July 25, 1945.

[Endorsed]: Filed January 10, 1944. [85]

Thereafter, on January 10, 1944, a Writ of Injunction was duly filed herein, in the words and figures following, to-wit: [86]

[Title of District Court and Cause]

WRIT OF INJUNCTION

The President of the United States of America
To Brian Connolly, and Daniel Connolly, and
all others acting in aid of or assistance of them,
or of either of them and all those in active
concert of participating with them, or either
of them, Greeting:

Pursuant to a judgment of the above-entitled court, in the above-named cause and matter, this day made and filed:

I, Therefore, in consideration thereof and of the particular matter in said judgment set forth, do strictly command you, the said defendants, Brian Connolly and Daniel Connolly, one and both, and all of your agents, servants, employees, attorneys, and lessees, and all others acting in aid of or assistance of them, or either of them, and all those in active

concert or participating with them, or either of them, do absolutely refrain and desist from driving, drifting, allowing to drift, herd, or conveying any livestock whatsoever, on or upon, or permitting the same to be driven, drifted, allowed to drift, herded or conveyed, or pastured, or grazed, or fed on the lands and premises hereinafter described, or otherwise interfering with the possession, use, or enjoyment by the plain- [87] tiff and its Indian wards of any of said lands and premises, or any part thereof, which said lands and premises are more particularly described as follows, to-wit:

Sections 23, 24, 25, 26, 27, 34 and 35, in Township 35 North, Range 10 West, Montana Principal Meridian; Section 10, Township 34 North, Range 9 West, Montana Principal Meridian; Sections 11 and 14, Township 35 North, Range 9 West, Montana Principal Meridian; Sections 20 and 21, Township 35 North, Range 9 West, Montana Principal Meridian; Southwest Quarter of the Northeast Quarter of Section 22, Township 34 North, Range 9 West, Montana Principal Meridian; Sections 16 and 21, Township 35 North, Range 9 West, Montana Principal Meridian; North Half of Section 11, Township 35 North, Range 9 West, Montana Principal Meridian; and South Half Section 11, Township 35 North, Range 9 West, Montana Principal Meridian;

Witness the Honorable Charles N. Pray, Judge of the District Court of the United States, in and

for the District of Montana, this 24th day of December, 1943, and in the one hundred and sixty-eighth year of the Independence of the United States of America.

Attest:

C. R. GARLOW

Clerk of the District Court of the United States
in and for the District of Montana.

(Seal) By C. G. KEGEL

Deputy Clerk. [88]

RETURN OF MARSHAL

United States of America

District of Montana

Office of United States Marshal—ss.

I, E. Lieberg, the duly appointed, qualified and acting United States Marshal, in and for the District of Montana, do hereby certify and return:

That I received the annexed and foregoing writ of injunction at Great Falls, Montana, on the 30th day of December, 1943, and personally served the same, together with a copy of the judgment granting and directing the issuance thereof, in said action, on the defendants, Brian Connolly and Daniel Connolly, by delivering to and leaving with each of said defendants personally on the 3rd day of January, 1944, in the County of Glacier, in the State and District of Montana, a copy of said writ of injunction, together with a copy of the

judgment granting and directing the issuance thereof.

Dated this 4th day of January, 1944.

E. LIEBERG

United States Marshal

In and for the District of
Montana.

By BERNARD J. REILLY

Deputy Marshal

Marshal's Fees and Expenses

For service of writ:

On Biran Connolly\$ 2.00

On Daniel Connolly 2.00

Expenses of service 10.35

Total\$14.35

[Endorsed]: Filed Jan. 10, 1944. [89]

Thereafter, on June 13, 1944, an Order Denying Motions for a New Trial was duly filed and entered herein, in the words and figures following, to-wit:

[90]

In the District Court of the United States in and
for the District of Montana.

No. 305.

[Title of Cause]

Motion for a new trial in the above entitled cause came on regularly for hearing on briefs submitted by counsel for the respective parties, which the court has considered.

Practically every question raised by the Motion for New Trial has already been discussed by counsel and decided by the court. Upon reconsideration of these questions as presented by the briefs, in the court's opinion a sufficient showing calling for a different decision, has not been made; consequently the motion for a new trial will have to be denied, and such is the order of the court herein.

CHARLES N. PRAY

Judge.

[Endorsed]: Filed June 13, 1944. [91]

Thereafter, on September 9, 1944, a Notice of Appeal was duly filed herein, in the words and figures following, to-wit: [92]

[Titled of District Court and Cause]

NOTICE OF APPEAL

To the Plaintiff, United States of America, and
to John B. Tansil, Esq., United States Attorney
for the District of Montana, Attorney for
Plaintiff:

You, and each of you, will please hereby take notice that Brian Connolly, who is also known as Biran Connolly, and Daniel Connolly, the defendants in the above entitled action, do hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final Judgment given, made and entered in this action on the 24th day of December, 1943.

Dated this 9th day of September, 1944.

Signed:

E. J. McCABE

S. J. RIGNEY

Attorneys for Defendants and
Appellants Brian Connolly
and Daniel Connolly.

Address: Suite I, Odd Fellows Building, Great
Falls, Montana.

[Endorsed]: Filed Sept. 9, 1944. [93]

Thereafter, on September 11, 1944, a Bond on
Appeal was duly filed herein, in the words and
figures following, to-wit: [94]

[Title of District Court and Cause]

BOND ON APPEAL

Know All Men By These Presents, That we, the
undersigned, Brian Connolly (also known as Biran
Connolly) and Daniel Connolly, as Principals, and
Ida Johnson Connolly and Jack Loring of
 , Glacier County, Montana, as Sure-
ties, are held and firmly bound unto the United
States of America, the Plaintiff above named, in
the full sum of Two Hundred Fifty (\$250.00)
Dollars to be paid to the said Plaintiff, successors
or assigns, to which payment well and truly to be
made, we bind ourselves, our successors and assigns,
jointly and severally by these presents.

Sealed with our seals and dated this 10th day of September, 1944.

The condition of this obligation is such that whereas, in the District Court of the United States, in and for the District of Montana, in the above entitled action, pending in said Court, wherein United States of America is Plaintiff and Brian Connolly (also known as Biran Connolly) and Daniel Connolly are Defendants, a judgment was rendered and entered against the said Defendants in the amount of Two Hundred Fifty Eight (\$258.00) Dollars by way of penalty provided by Section 179, Title 25, U. S. Code, and the further sum of One (\$1.00) Dollar, nominal damages, and for a permanent injunction against said Defendants [95] one and both, and their agents, servants, employees, attorneys and lessees, and all others acting in aid of or assistance of them, or of either of them, and all those in active concert or participating with them, or either of them, forever restraining and absolutely enjoining said Defendants and the other persons aforesaid, or either or any of them, doing or allowing to be done certain acts or things particularly described in said judgment, reference to which judgment is hereby made for further particulars, and adjudging recovery of costs of Plaintiff in said action; and

Whereas, the Defendants Brian Connolly (also known as Biran Connolly) and Daniel Connolly have filed in said action their Notice of Appeal from said judgment to the Circuit Court of Appeals of the United States for the Ninth Circuit, and said

Defendants propose to prosecute said appeal to reverse said judgment;

Now, Therefore, In consideration of said appeal if the above named Brian Connolly (also known as Biran Connolly) and Daniel Connolly, as such Defendants, shall pay all costs if the appeal is dismissed or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified, then this obligation shall be void, otherwise to remain in full force and effect.

BIRAN

[Seal]

BRIAN CONNOLLY

[Seal]

DANIEL CONNOLLY

Principals.

[Seal]

IDA JOHNSON CONNOLLY

[Seal]

JACK LORING

Sureties.

State of Montana,
County of Glacier—ss.

Ida Johnson Connolly and Jack Loring, residents of Glacier County, Montana, being first duly severally sworn upon oath, each for himself, deposes and says: [96]

That he is a resident and freeholder within Glacier County, Montana, and that he is worth the amount of money specified in the foregoing Bond as the penalty thereof to-wit: Two Hundred Fifty (\$250.00) Dollars over and above all of his just debts and liabilities and property exempt from execution.

IDA JOHNSON CONNOLLY

JACK LORING

Subscribed and sworn to before me this 10th day of September, 1944.

S. J. RIGNEY

Notary Public for the State of Montana. Residing at Cut Bank, Montana.

My commission expires February 6, 1945.

State of Montana,
County of Glacier—ss.

I, do hereby
certify and declare as follows, to-wit:

That I am the duly elected, qualified and acting Assessor of Glacier County, Montana, and that Ida Johnson Connolly and Jack Loring the Sureties names in the within and foregoing Bond on Appeal, appear as owners of real estate and personal property upon the assessment and tax records of Glacier County, Montana, in value as follows:

Ida Johnson Connolly the sum of Eleven Hundred Twenty Dollars; Jack Loring the sum of Thirty Eight & 35 Dollars.

In Witness Whereof, I hereunto subscribe my name as Assessor aforesaid on this 10th day of September, 1944.

EDWARD MURPHY

Assessor of Glacier County,
Montana.

[Endorsed]: Filed Sept. 11, 1944. [97]

Thereupon on September 9, 1944, a copy of Notice of Appeal was mailed to the United States Attorney, Billings, Montana, and on September 11, 1944, a copy of the Bond on Appeal was mailed to the United States Attorney, Billings, Montana, the Clerk's docket entry of such mailing being as follows, to-wit: [98]

[Title of Cause.]

FILINGS—PROCEEDINGS.

Sept. 9, 1944. Filed Notice of Appeal by defendants, and mailed copy of same to United States Attorney, Billings, Montana.

Sept. 11, 1944. Filed Bond on Appeal.

Sept. 11, 1944. Mailed copy bond on appeal to United States Attorney, Billings, Montana. [99]

Thereafter, on September 20, 1944, a Transcript of Evidence was duly filed herein, in the words and figures following, to-wit: [100]

In the District Court of the United States,
District of Montana.
Great Falls Division

Case No. 305

UNITED STATES OF AMERICA,
Plaintiff,

vs.

BRIAN CONNOLLY, et al.,
Defendants,

Appearances:

For Plaintiff,
ROY F. ALLAN, Esquire.

For Defendants,
E. J. McCABE, Esquire.

TRANSCRIPT OF TESTIMONY

Be It Remembered That this matter came on regularly for hearing at Great Falls, Montana, on Thursday, May 6, 1943, at ten o'clock A.M., before the Honorable C. N. Pray, Judge Presiding, sitting without a jury.

Whereupon the following proceedings were had and done. [105]

The Court: Case No. 305, the case of the United States versus Brian Connolly and others. Are you ready for the Government?

Mr. Allan: Yes, your Honor.

The Court: Are you ready for the defendants?

Mr. McCabe: Yes.

The Court: Will you make a brief statement of the case?

Mr. Allan: This action is one which the Government is suing Brian Connolly and Daniel Connolly, his son, who are two Indian Wards of the Blackfeet Tribe, for trespass on the Blackfeet Indian Reservation. The allegations of the complaint set forth the formal allegations as to the Court's jurisdiction, the boundaries of the Blackfeet Indian Reservation, the lands upon which Mr. Connolly has a right to graze, and the lands upon which he is in definite trespass.

The complaint likewise sets forth that his trespass is a wilful trespass and in violation of Sec. 179, Title 25, United States Codes.

The complaint originally asked for a temporary restraining order which was granted by the Court ex parte, then a hearing was had for an injunction pendente lite which was likewise granted by the Court.

The case today is for the permanent injunction, and likewise for damages for the trespass.

In answer to the complaint the defendants admit most of the allegations of the complaint, with the exception of pertinent parts, such as wilful trespass, and in his answer sets forth certain rights [106] that he has to trespass, to go upon the land; not admitting a trespass by reason of his Indian relationship. These matters, if the Court will recall, were all considered by the Court on briefs and motions.

The Court has decided that the Indian has no right on such land by reason of his Indian relationship.

I think that condenses the whole matter, your Honor.

Mr. McCabe: The injunction feature is based upon intent, and throughout, if I construe the complaint correctly, I disagree with the counsel. The charge in a nutshell here is that the defendants willfully trespassed upon the land.

GOVERNMENT'S CASE

Whereupon

ALBERT E. STEPHENSON,

a witness called and sworn on behalf of the Government, testified as follows:

Direct Examination

By Mr. Allan:

Q. Will you please state your name?

A. Albert E. Stephenson.

Q. And what is your business or your occupation?

A. Forest Supervisor on the Blackfeet Indian Reservation.

Q. When you say Forest Supervisor, just briefly state what are your duties as such?

A. Administrator in charge of the Forestry, and the grazing activities on the Reservation.

Q. That is on the Blackfeet Indian Reservation?

A. Yes, sir. [107]

(Testimony of Albert E. Stephenson.)

Q. How long have you been engaged in that capacity?

A. I have been on the Blackfeet Reservation since August, 1941.

Q. Now, as the man in charge of Forestry and Grazing on the Blackfeet Indian Reservation, do you have under your care and custody the records of the Blackfeet Indian Reservation, as to your particular type of work? A. Yes.

Q. Including permits to graze, and matters of that type? A. Yes.

Q. Directing your attention to plaintiff's exhibit one, I will ask you to briefly identify that, please?

A. That is a grazing permit issued to Mr. Connolly for what is known as Range Unit No. 12, and covers the permit period of November 1, 1940, to April 30, 1943.

Q. Directing your attention specifically to this grazing permit, does it cover the brand of his cattle and horses, is that shown in there?

A. His brand for cattle and horses are not shown on this permit.

Q. Do you have a permit that it is shown on there? A. No.

Q. When you made reference to Unit No. 12, is that correct? A. Yes.

Q. Will you just step over here to this map, and show us where that is, please?

(Witness complies.) [108]

Q. Mr. Stephenson, what is this map? Will you please explain it to us?

(Testimony of Albert E. Stephenson.)

A. This map is a Range Unit map of the Blackfeet Indian Reservation, showing all the various Range Units. The numbers inside the black lines area indicate the Unit numbers, and the black line represents the Unit line, or Unit Boundaries.

Q. And what is the basis of this map itself? What type of map is it?

A. That is the official map of the Blackfeet Indian Reservation.

Q. Prepared by Engineers of the United States Government for use on the Blackfeet Indian Reservation?

A. Yes.

Mr. McCabe: We will admit that it is.

Mr. Allan: All right. The Government offers Exhibit number one in evidence, which is the lease.

Mr. McCabe: No objections.

Whereupon Plaintiff's Exhibit number one was received in evidence, and is in words and figures as follows, to-wit:

PLAINTIFF'S EXHIBIT No. 1

Agency Office 1-5-Ind-8086
Statement and Certificate
of Award

Date May 7, 1940

| | |
|-------------------------------|--|
| Interior | Indian Browning, Montana |
| (Department or establishment) | (Buruea) or office (Location) |

Method of or Absence of Advertising. (Section 3709 of the Revised Statutes) [109]

1. After advertising in newspapers.

(Testimony of Albert E. Stephenson.)

Plaintiff's Exhibit No. 1—(Continued)

2. (a) After advertising by circular letters sent to.....dealers.

(b) And by notices posted in public places (If notices were not posted in addition to advertising by circular letters sent to dealers, explanation of such omission must be made. The notation on the certificate below must be "2 (a) (b)" or "2 (a)," Depending on whether or not notices were posted.)

2. Without advertising, under an exigency of the service which existed prior to the order and would not admit of the delay incident to advertising.

4. Without advertising in accordance with..... See below.....

5. Without advertising, it being impracticable to secure competition because of.....

(Here state circumstances under which the securing of competition was impracticable)

Award of Contract.

A. To lowest bidder as to price (Expenditures).

B. To other than the lowest bidder as to price (Expenditures.)

C. To highest bidder as to price (Receipts).

D. To other than the highest bidder as to price (Receipts).

Certificate

I Certify that the foregoing statement is true and correct; that the agreement was made in consequence of No. 4 of the method of or absence of advertising and in accordance with award of contract lettered D, as shown above; that where lower

(Testimony of Albert E. Stephenson.)

Plaintiff's Exhibit No. 1—(Continued)

bids (expenditure contracts) or higher bids (receipt contracts) as to price were received a statement of reasons for their rejection, [110] together with an abstract of bids received, including all lower than that accepted in case of expenditure contracts and all higher in case of receipt contracts, is given below or on the reverse hereof or on a separate sheet attached hereto; that the articles or services covered by the agreement (expenditure) are necessary for the public service, and that the prices charged are just and reasonable.

Unit was allocated to Indians without advertising in accordance with Sec. 9 of the General Grazing regulations and Blackfeet Council Resolution No. 35.

Permit begins November 1, 1940 instead of May 1, 1940 in order to allow permittee some extra time in which to comply with the bond requirements since this could not be done to complete permit by May 1. The period not included has been treated as trespass.

U. S. INDIAN SERVICE

Forestry & Grazing

Received June 11, 1940. Regional Office, Billings, Montana.

.....

(Signature of contracting officer)

Superintendent

(Title)

(Testimony of Albert E. Stephenson.)

Plaintiff's Exhibit No. 1—(Continued)

United States

Department of the Interior

Office of Indian Affairs

Unit No. 12

Permit Fee: \$5.00

Contract No. 1-5-Ind-8086

Grazing Permit

On and Off

(Write all names in full) [111]

Blackfeet Indian Agency Browning, Montana.

By authority of law and under regulations prescribed by the Secretary of the Interior, Brian Connolly & Fred Chouquette, of Browning, Montana is hereby granted permission to hold and graze livestock on the Blackfeet Indian Reservation for a period beginning November 1, 1940, and terminating not later than April 30, 1943, on the range unit usually known or described as follows: Range Unit No. 12, containing 3680.00 acres allotted, and included under on-7-off clause are 1200.00 acres owned allotted, 880.00 acres private land, including all unfenced Indian allotments on which authority to grant grazing privileges have been secured, and covering livestock in kind and numbers, for the grazing period, and at the rate per head as shown in the following scheduly, subject to the payment of all fees and full compliance with the attached range control stipulations which are made a part of this permit: [112]

(Testimony of Albert E. Stephenson.)

Plaintiff's Exhibit No. 1—(Continued)

| Year | Number of Head | Kind of Stock | Grazing Period From— To— | Rate per Head | Amount | Payable One-half One-half |
|------|-------------------|------------------|-----------------------------|------------------|----------|------------------------------|
| 1940 | 153 | Cattle | 11/1/40 4/30/41 | 1.80 | \$276.00 | 8/1/40 |
| 1941 | 153 | Cattle | 5/1/41 4/30/42 | 3.60 | 552.00 | 8/1/41 |
| 1942 | 153 | Cattle | 5/1/42 4/30/43 | 3.60 | 552.00 | 8/1/42 |

Unless authorized by Superintendent Blackfeet Agency in writing, only livestock bearing the brands and marks herein shown shall be grazed under authority of this permit:

| | | | | |
|----------------|-----------|--------------|---------------|----------|
| Cattle Branded | Ear Marks | Horse Brands | Sheep Branded | Ear Mark |
| R | L R | L R | Wool Brand | R L |

[113]

(Testimony of Albert E. Stephenson.)

Plaintiff's Exhibit No. 1—(Continued)

This permit is issued with the understanding that 240 head of cattle will be grazed on this range, (64% allotted, 21% owned allotted) 85 percent of which is Indian land and 15 percent privately owned or leased range, evidence of the right to the use of which is recorded with Supt. Blackfeet Agency.

It is further understood and agreed that if the permittee allows a greater number of livestock than the total number herein stipulated to graze upon this range unit of which the Indian range is a part, during the period this permit is in effect, this on-and-off clause shall immediately become null and void and the stock in excess of the number upon which fees are paid to the Indians shall be considered as in a state of trespass and treated accordingly. (Delete the above paragraph if not applicable.)

In consideration of the above privileges, the permittee agrees to pay to Superintendent Blackfeet Agency for the use and benefit of the Indians entitled to occupy the lands above described, the sum of money found to be due from the permittee according to the provisions of this permit (calves, colts, and lambs under 6 months of age not to be counted), and they further agree to pay the grazing fees annually or semi-annually in advance. Unless the grazing fees shall be paid in advance for the full term of the permit, these payments will be guaranteed by an acceptable corporate surety bond

(Testimony of Albert E. Stephenson.)

Plaintiff's Exhibit No. 1—(Continued)

in a penal sum of not less than the total amount due in any 1 year under the terms of the permit, namely, Five hundred fifty-two and no/100 dollars, [114] \$552.00) (with a maximum limit of \$35,000), or by a bond for the same amount with at least four individual sureties who shall each qualify in an amount equal to twice the amount of the bond, or by depositing a cash bond with.....equal to one-half of the annual grazing fees; said cash deposit to be credited on the last installment due on the permit, provided the terms of the permit have been faithfully carried out by the permittee.

It is understood and agreed by the permittee that this instrument is not a lease and is not to be taken or construed as granting any leasehold interest in or to the land described herein, but that it is a permit terminable and revocable in the discretion of Approving Officers and in any event not to extend beyond April 30, 1943.

It is also understood and agreed that any part of the area covered by this permit may be excluded from this range unit by Approving Officers in the exercise of their discretion, by the transfer of title through sale allotted land, or by the extinguishment of the Indian right of occupancy of the lands; and thereupon this permit shall cease and determine as to the parts of the range unit thus eliminated, the number of stock stipulated shall be reduced in conformity thereto, and the payments due here-

(Testimony of Albert E. Stephenson.)

Plaintiff's Exhibit No. 1—(Continued)

under shall be adjusted accordingly, provided that the termination of the permit has not been due to the fault of the permittee or to a violation of the terms of this permit by or on behalf of the permittee.

The permittee hereby agrees that he and his employees [115] will not use any part of the range unit for the sale, manufacture, storage, or drinking of intoxicants or the handling of narcotics, and neither he nor his employees will take part in immorality or any illegal practices whatever in or upon the reservation. Violation of this clause will be deemed sufficient ground for cancelation of the permit.

All livestock grazed under this permit and all other property used in connection with the permit shall be held as security for the payment of any grazing fees due and for the full performance of the agreement, and all payments due hereunder shall constitute a prior and first lien upon said livestock and other property incidental to the enjoyment of the privileges granted. The Agency office contains public records of the United States pertaining to trust Indian allotments and all persons are charged with notice and knowledge thereof. A copy of each permit must be filed promptly in the Agency office. Such copy shall be available at all times for public inspection. If the permittee so

(Testimony of Albert E. Stephenson.)

Plaintiff's Exhibit No. 1—(Continued)

desires he may file or record a copy of the permit, at his own expense, in the proper county office.

This permit shall not be assigned, sublet, or transferred without the written consent of the sureties and Approving Officers.

The Superintendent and the Regional Forester shall make decisions relative to the interpretation of the terms of the permit and the range control stipulations which are attached hereto, and the terms of the permit cannot be varied in any detail except as herein provided [116] without the written approval of the surety, the permittee, and the issuing officers.

Done at the Blackfeet Indian Agency, this 7 day of May, 1940.

(Seal)

C. L. GRAVES

C. L. Graves, Superintendent

(Issuing Officers)

Concurred in June 11, 1940.

DONALD F. FIELD

Acting Regional Forester.

I accept the permit with the foregoing conditions and the attached range control stipulations.

BRIAN CONNOLLY

FRED CHOUQUETTE

Permittee

(Testimony of Albert E. Stephenson.)

Plaintiff's Exhibit No. 1—(Continued)

To Be Executed in Quintuplicate Grazing
4376511

Department of the Interior

Office of Indian Affairs

Bond for Corporate Surety

Know All Men By These Presents, That we, Brian Connolly & Fred Chouquette of Browning, State of Montana, and....., of....., State of, partners doing business under the firm name of....., having an office and principal place of business at Browning, in the State of Montana, as principal, and Fidelity and Deposit Company of Maryland, a corporation organized and existing under the laws of the State of Maryland, having its principal office at Baltimore, as surety, are held and firmly bound unto the United States of America in the penal sum of Five Hundred fifty-two [117] and no/100 dollars (\$552.00), lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, each of us, and each of our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 27th day of May, 1940.

The Condition of This Obligation is Such, that whereas the above-bounden Brian Connolly and Fred Chouquette, as principals, have accepted a permit dated May 7, 1940, for the use of tribal land

(Testimony of Albert E. Stephenson.)

Plaintiff's Exhibit No. 1—(Continued)

and/or allotted Indian land of the Blackfeet Indian Reservation of the State of Montana, for grazing purposes, said land being known as Range Unit No. 12 of the said reservation and comprising approximately 3680.00 allotted and 1200.00 acres owned allotted, the identification of which herein by legal subdivision is expressly waived by both the principal and surety hereto.

Now, Therefore, if the above-bounden Brian Connolly & Fred Chouquette, as principals, their heirs, executors, administrators, successors, and assigns, shall faithfully carry out and observe all the obligations assumed in the acceptance of said permit, affecting the interest of the said Blackfeet tribe of Indians and of the individual Indians owning allotments within the area covered by said permit and shall observe all the laws of the United States and regulations made or which shall be made thereunder for the government of trade and intercourse with Indian tribes, and all regulations that have been or shall hereafter be lawfully prescribed [118] by the Secretary of the Interior relative to grazing permits executed by or in behalf of the said Blackfeet tribe or for Indian allottees thereof and shall in all particulars comply with the provisions of said permit and said regulations, then this obligation shall be null and void; otherwise to remain in full force and effect; and it is expressly agreed that failure of the principal herein to make any installment payment when due under the terms of this permit shall

(Testimony of Albert E. Stephenson)

Plaintiff's Exhibit No. 1—(Continued)

at once make both the principal and the surety on this bond liable for the full amount of such payment.

In Witness Whereof, we hereunto set our hands and seals this the 27th day of May, 1940.

(Seal)

BRIAN CONNOLLY

FRED CHOUQUETTE

Blockfoot, Mont.

.....

Corporate principal signature

Attest:

.....

Secretary

By FIDELITY AND DEPOSIT

COMPANY OF MARYLAND

A. B. KALIN

Atty-in-fact

(Corporate Seal of Surety)

Witnesses:

LORAIN HALSETH

Browning, Mont.

MARCELLA WELLMAN

Browning, Montana

Department of the Interior. Office of Indian Affairs. June 8, 1940.

Approved:

C. L. GRAVES

Superintendent. [119]

In all cases where an officer signs for a corporation, either as principal or surety, there must be

(Testimony of Albert E. Stephenson)

Plaintiff's Exhibit No. 1—(Continued)

attached to the bond either an original certification, signed by the board of directors, of the authority of the signing officer, or officers, to sign for and in behalf of the corporation; or a copy of a resolution of the board of directors granting a general authority of this character to the signing officer or officers, certified by the president and secretary of the corporation, under the corporate seal, as a true and accurate transcript of the resolution.

On and Off

Consideration for Owned Allotted Land
for Indians

I, the undersigned Brian Connolly, allottee on the Blackfeet Indian Reservation, hereby certify that I have absolute control of the following described land located within the boundary of Grazing Unit No. 12, and that this land will be used for grazing purposes and for the production of feed for stock held under permit and grazed on land included in Grazing Unit No. 12, as described in the schedule of Indian Land attached to this Grazing Permit issued by the Department of the Interior, Office of Indian Affairs. It is understood and agreed that this certificate is to be attached to and become a part of the Grazing Permit on the above Grazing Unit. [120]

(Testimony of Albert E. Stephenson)

Plaintiff's Exhibit No. 1—(Continued)

LAND DESCRIPTION

| | |
|--|---------------|
| 2832 Daniel B. Connolly, SE/4, Sec. 23; NW/4 W/2 NE/4, Sec. 26; T. 35 N., R. 9 W..... | 400.00 |
| 2831 Merle Connolly, S/2, E/2 NE/4, Sec. 26; T. 35 N., R. 9 W. | 400.00 |
| 2833 Nora Connolly, E/2, E/2 NW/4, Sec. 35; T. 35 N., R. 9 W. | 400.00 |
| | <hr/> 1200.00 |

BRIAN CONNOLLY

Permittee

Subscribed and sworn to before me this.....day
of June 3, 1940.

C. L. GRAVES

Superintendent

The estimated carrying capacity for the above
described land is 50 head of cattle annually.

Approved

C. L. GRAVES

Superintendent

On-and-Off Certificate of Right
To Use Deeded or Leased Land

I, the undersigned Brian Connolly, hereby certify that I have absolute control of the following described land located within the boundary of Grazing Unit No. 12, and that this land will be used for grazing purposes and for the production of feed for livestock held under permit as described in the Scheduly of Indian Land attached to this Grazing

(Testimony of Albert E. Stephenson.)

Plaintiff's Exhibit No. 1—(Continued)

Permit issued by the Department of the Interior, Office of Indian Affairs. It is understood and agreed that this certificate is to be attached to and become a part of the Grazing Permit on [121] above Trazing Unit.

LAND DESCRIPTION

| | |
|---|-----------|
| SW/4, W/2 W/2 SE/4 Sec. 25 | 200 acres |
| E/2 E/2 NE/4, Sec. 34; W/2 NW/4, SW/4 Sec. 35.... | 280 acres |
| <hr/> | |
| all in Twp. 35 N. R. 9 W. Total..... | 480 acres |
| SE/4 NE/4, NE/4 SE/4, Sec. 28..... | 80 |
| N/2 Sec. 25 | 320 |
| <hr/> | |
| | 880 |

BRIAN CONNOLLY

Permittee

Subscribed and sworn to before me this 3rd day of June, 1940.

(Notarial Seal) H. B. PERKINS

Notary Public for the State of Montana. Residing at Browning, Montana.

My commission expires October 25, 1940.

The estimated carrying capacity for the above described land is 37 head of cattle annually.

Approved:

C. L. GRAVES

Superintendent

(Testimony of Albert E. Stephenson.)

Plaintiff's Exhibit No. 1—(Continued)

Legend

Range Unit Maps

Permittee Brian Connolly & Fred Choquette

Range Unit No. 12

Permit Period.....

| | | |
|--------------------------|--|---------------|
| <input type="checkbox"/> | Trust allotments on which authority to grant grazing Privileges have been obtained..... | 3680.00 acres |
| <input type="checkbox"/> | Trust Allotments owned by family using range unit | 1200.00 acres |
| <input type="checkbox"/> | Trust allotments in heirship status where more than 1/10 undivided interest is owned by family using range and included in "on and off" clause | acres |
| <input type="checkbox"/> | Patent in fee or deeded land included in "on and off" clause | 880 |
| | | [122] |
| <input type="checkbox"/> | Trust allotments on which authority has not been obtained and not included in permit..... | acres |
| <input type="checkbox"/> | Patent in fee or deeded land not included in "on and off" clause. | _____ |
| | Total..... | 5760 acres |
| | | [123] |

TOOLE COUNTY ABSTRACT COMPANY

As to the correctness of your title is provided with our ABSTRACT. Millions of dollars are invested on the evidence of the abstract, as to the legality of title giving safety to the investment.

1/1-2

(Testimony of Albert E. Stephenson.)

Plaintiff's Exhibit No. 1—(Continued)

Legend

Range Unit Maps

Permittee Brian Connolly & Fred Choquette

Range Unit No. 12

Permit Period.....

| | | | |
|--------------------------|--|---------------|-------|
| <input type="checkbox"/> | Trust allotments on which authority to grant grazing Privileges have been obtained..... | 3680.00 acres | |
| <input type="checkbox"/> | Trust Allotments owned by family using range unit | 1200.00 acres | |
| <input type="checkbox"/> | Trust allotments in heirship status where more than 1/10 undivided interest is owned by family using range and included in "on and off" clause | acres | |
| <input type="checkbox"/> | Patent in fee or deeded land included in "on and off" clause | 880 | [122] |
| <input type="checkbox"/> | Trust allotments on which authority has not been obtained and not included in permit..... | acres | |
| <input type="checkbox"/> | Patent in fee or deeded land not included in "on and off" clause. | _____ | |
| | Total..... | 5760 acres | [123] |

(Testimony of Albert E. Stephenson.)

Plaintiff's Exhibit No. 1—(Continued)

| No. | Allottee | Description | S | T | R | Acreage | Amount |
|------|--------------------------|--------------------------------|----|----|---|---------|--------|
| 2928 | George Ground | W/2 | 23 | 35 | 9 | 320.00 | 48.00 |
| 2742 | Emma C. Blood | N/2 NE/4 | 23 | " | " | 80.00 | 12.00 |
| 2743 | Mollie Blood | S/ NE/4 | 23 | " | " | 80.00 | 12.00 |
| 2835 | Jean Connolly | W/2 | 24 | " | " | 320.00 | 48.00 |
| 2766 | Mike Bullechild | N/2 | 27 | " | " | 320.00 | 48.00 |
| 4120 | Margaret Schultz | N/2 SE/4 | 27 | " | " | 80.00 | 12.00 |
| 289 | Handingback Spottedeagle | E/2 SE/4 SE/4 | 27 | " | " | 20.00 | 3.00 |
| 400 | Jack Comesatnight | SW/4, SW/4 SE/4, W/2 SE/4 SE/4 | 27 | | | | |
| | | NW/4 NE/4, W/2 NE/4 NE/4 | 34 | " | " | 280.00 | 42.00 |
| 3082 | Frank Madplume | NW/4, N/2 NE/4, SW/4 NE/4 | 28 | " | " | 280.00 | 42.00 |
| 3083 | Victor Madplume | SW/4, S/2 SE/4, NW/4 NE/4, | 28 | | | | |
| | | NW/4 NW/4 | 33 | " | " | 320.00 | 48.00 |
| 3079 | Raymond Madplume | S/2 NW/4, SW/4, W/2 SE/4, W/2 | | | | | |
| | | E/2 SE/4 | 33 | " | " | 360.00 | 54.00 |
| 3077 | Annie Madplume | NE/4 NW/4, NE/4 Sec. 33, NW/4 | 34 | " | " | 360.00 | 54.00 |
| 289 | Holdingback Spottedeagle | SW/4 NE/4, W/2 SE/4 NE/4 | 34 | " | " | 60.00 | 9.00 |
| 3078 | Victoria Madplume | E/2 E/2 SE/4 Sec. 33, S/2 | 34 | " | " | 360.00 | 54.00 |
| 3084 | Josephine Madplume | W/2 | 36 | " | " | 320.00 | 48.00 |
| 2794 | John Calfrobe | SE/4 SE/4 | 25 | 35 | 9 | 40.00 | 6.00 |
| 2795 | Margaret Calfrobe | E/2 W/2 SE/4 | 25 | 35 | 9 | 40.00 | 6.00 |
| 2796 | Snick Calfrobe | NE/4 SE/4 | 25 | 35 | 9 | 40.00 | 6.00 |

(Testimony of Albert E. Stephenson.)

Plaintiff's Exhibit No. 1—(Continued)

United States

Department of the Interior

Office of Indian Affairs

Range Control Stipulations

1. Grazing Permits.

Grazing permits on Indian reservations are issued subject to certain restrictions and regulations, and with the distinct understanding that the ranges will be reduced both in size and carrying capacity whenever the Commissioner of Indian Affairs shall consider such action essential to the protection of the interests of the Indians. Grazing permits cover Indian lands only, inclusive of unallotted land not otherwise disposed of and all unfenced allotments on which powers of attorney have been executed to the superintendent authorizing him to act for the allottees. Permits must be executed within thirty days after the receipt of notification of an award.

2. Payment of Grazing Fees.

Grazing fees shall be paid annually or semiannually in advance, as specified in the permit. No charge will be made for animals under six months of age at the time of entering the reservation, which are the natural increase of the stock upon which fees are paid. Payment will be made for calves, colts, and lambs over six months old for the time grazed on the reservation after that age is reached at the same rate as for full grown stock.

(Testimony of Albert E. Stephenson.)

Plaintiff's Exhibit No. 1—(Continued)

3. Excess or Deficit of the Number of Stock Specified.

Unless the number of livestock specified in the permit is reduced by the Commissioner of Indian Affairs, [125] the permittee will not be allowed credit or rebate in case the full number is not grazed on the area. However, if the number authorized is exceeded, without previous authority, the permittee will be required to pay in addition to the regular charges as provided in the permit, a penalty equal to 50 per cent thereof for such excess stock and the stock will be held until full settlement has been made.

4. Crossing Permits.

Livestock shall not be driven upon or across any reservation without first securing a standard form crossing permit No. 5-929 properly signed by an authorized official of the Indian Service. This permit will state the number of head, dates of travel, class of stock, trail to be used, and destination. Such stock must be moved not less than 5 miles in case of sheep and 10 miles in case of cattle each day, and stock shall not remain more than 12 hours at any bed ground or camping place. In case of unnecessary delay, or willful trespass, the superintendent or his authorized agent shall assess and collect such damages as may seem reasonable. Owners of stock will anticipate their time of entry and secure a permit well in advance of the date when

(Testimony of Albert E. Stephenson.)

Plaintiff's Exhibit No. 1—(Continued)

the stock will enter upon the reservation. All stock will be refused entry upon the reservation until a permit to enter has been issued. The agency office and the officer in charge must be notified at least 5 days in advance in order that arrangements may be made for an official to meet the stock. Stock owners who introduce their stock upon the reservation without proper authority will be considered [126] as trespassers and their stock will be removed from the reservation and denied the right to return. The right is hereby reserved to issue crossing permits over all ranges, regardless of whether or not special driveways have been established thereover, and provided that the movement of stock so authorized shall be effected under the supervision of the superintendent or his agent. A permittee will not authorize another permittee to drive stock across his range.

5. Quarantine Regulations.

All stock covered by permit is subject to the quarantine laws and regulations now in force or hereafter to be promulgated by the United States and the State in which the reservations are situated.

6. Law and Order.

All regulations relative to the maintenance of law and order on Indian reservations and those forbidding the introduction of intoxicating liquors will be complied with by the permittee and his employees.

(Testimony of Albert E. Stephenson.)

Plaintiff's Exhibit No. 1—(Continued)

7. Entering the Range.

The earliest date upon which stock will be permitted to enter the range will be the date shown in the permit. Notice must be given to the superintendent prior to entering the reservation. On reservations where permanent driveways have been established all livestock will be required to enter or leave the reservation on the particular driveway designated by the superintendent. On reservations where driveways have not been established and roads and trails are used for the movement of livestock, the route to be followed will be the most practicable one available [127] and will be designated by the superintendent.

8. Counting of Livestock.

All livestock grazing upon or crossing Indian reservations must be counted by an authorized officer of the Indian Service. Arrangements should be made for counting all livestock before it enters the reservation. Permittees are required to notify the superintendent a sufficient length of time in advance to permit him to have a representative present when stock are counted on or off the reservation. The right is reserved by the Indian Service to have a representative present at each round-up to check the number of stock, and in the event that the permittee shall fail or refuse to round-up his stock at proper times and in a satisfactory manner for the purpose of allowing a count of the stock,

(Testimony of Albert E. Stephenson.)

Plaintiff's Exhibit No. 1—(Continued)

the superintendent shall have the right to round-up and count said stock at the expense of the permittee.

9. Branding of Stock.

All livestock grazed under permit on Indian reservations or livestock which is authorized to cross said reservations under formal crossing permit must be branded so as to be identified. The brands of all livestock grazed upon the reservation under permit must be recorded in the office of the superintendent with the owner's name.

10. Affidavit of Permittee.

If grazing permits are issued for a period exceeding one year, the permittee will be required to execute (or have executed by a competent foreman) an affidavit showing the number of livestock grazed under [128] authority of such permit and on hand at the close of June of each year, and, in case of occupancy of the area during the previous winter, the number carried over, if any; and another affidavit at the close of December of each year showing the livestock then on hand and the number carried during the summer of that year, or such period as may be required by the Commissioner of Indian Affairs. Affidavits should be made on standard form 5-370.

11. Camp Record.

A camp record showing the number of each camp, approximate number of days of feed avail-

(Testimony of Albert E. Stephenson.)

Plaintiff's Exhibit No. 1—(Continued)

able, dates used and losses from predatory animals, etc., will be required in connection with all sheep grazing permits. Reports should be made by the permittee at the close of each grazing season on standard form 5-518. A record should also be made of all predatory animals killed on the range unit by the permittee and his employees and a report made to the superintendent. In States where bears are protected by law only such bears may be killed as are actually killing or attempting to kill livestock.

12. Camp Fires.

Camp fires must not be built against logs, stumps, or trees. The ground around the fire must be cleared of all inflammable material to at least a distance of 6 feet on all sides. The fire itself must be built in a hole cut at least 10 inches into the mineral earth. The camp fire must be completely put out with water or mineral earth whenever the camp is left alone [129] even for a short time. It is suggested that stoves be used in camp whenever possible, in order to decrease the fire hazard. Each camp outfit must include a shovel and an ax, each in good condition.

13. Smudge Fires.

Smudge fires must not be made unless absolutely necessary. They must never be made in places which have not been fully cleared for a distance of 25 feet on all sides. A smudge fire must never

(Testimony of Albert E. Stephenson.)

Plaintiff's Exhibit No. 1—(Continued)

be made near the roots of a tree, in or near a stump or snag, and must be close to and in plain sight of camp. Such fires, when not service the purpose for which they are made and when the camp is deserted or moved, must be immediately and completely extinguished with water or by burying with mineral earth.

14. Conduct in Case of Fire.

Whenever a permittee discovers an unauthorized and uncontrolled fire burning, whether started by his own carelessness or in some other way, he should put it out if he can. If it can not be put out or placed under temporary control, it should be reported to the nearest forest or grazing officer as soon as possible. In case of fire all range users are expected to place themselves and their employees at the service of the forest or grazing officer in charge for such work in connection with the fire as the officer may request. The failure of any permittee to cooperate to the fullest extent possible in the control of forest and range fires may result in the immediate cancellation of any permits which he may hold and his removal from the reservation. The [130] unauthorized setting of a fire or carelessness in connection with an authorized fire may result in criminal prosecution under Section 6 of the act of June 25, 1910 (36 Stat. L, 855-857).

15. Trespass.

All permittees must avoid trespassing. In case

(Testimony of Albert E. Stephenson.)

Plaintiff's Exhibit No. 1—(Continued)

of trespass the herder and packer may be excluded from the reservation. The owner is liable to prosecution for civil damages. When upon the reservation the herder, packer, and camp mover must understand that should the instructions of their employer and the forest or grazing officer disagree as to the manner in which the range should be used, they must follow the instructions of the officer. Ordinarily the grazing movements of stock of a permittee within the range assigned him will not be interfered with, but the superintendent reserves the right to direct such movement whenever he deems it necessary for the proper protection and utilization of the range. The following acts constitute trespass:

(a) The grazing upon or the driving of any stock across the reservation without a written permit, or the grazing upon or the driving across any reservation in violation of the terms of a permit.

(b) The grazing of stock upon Indian land within an area closed to grazing of that kind of stock.

(c) The grazing of stock by a permittee or lessee upon an area withdrawn from use for grazing purposes.

(d) Allowing stock to drift and graze upon the reservation without a written permit.

(e) Violation of any of the terms of grazing permit or crossing permit. [131]

(Testimony of Albert E. Stephenson.)

Plaintiff's Exhibit No. 1—(Continued)

(f) Refusal to move stock upon instructions of an authorized officer of the Indian Service when an injury is being done to the range or forest by reason of improper handling of the stock.

16. Damage to Roads, Trails, or Springs.

Any person or persons to whom grazing permits or crossing permits have been issued receive such permits with the understanding that they are obligated to repair all damage to roads or trails caused by the presence of their stock in any part of the reservation. Permittees must build any new roads, trails, or bridges found necessary for the proper handling of their stock. They must also fence any springs or seeps on Indian land which are being damaged by the trampling of their stock, if they shall be order to do so by the superintendent or his duly authorized representative.

17. Damage to Indian Property.

The permittee will exercise due precaution to prevent injury to the premises or livestock of Indians and will be required to return to the vicinity of any Indian's home any livestock belonging to such Indian which may have strayed through the handling of stock under this permit or drifted away with the permittee's herd. The permittee will be required to reimburse the Indians for any damage that may be done to their premises or livestock through the acts of the permittee, his employees, or livestock.

(Testimony of Albert E. Stephenson.)

Plaintiff's Exhibit No. 1—(Continued)

18. Bedding Sheep.

The bedding ground must be changed every day unless some natural condition will not allow the change to be made. Where possible the bedding out system will be used. [132] Except where camp wagons are used no bed ground will be occupied for more than two nights, and where camp wagons are being used three nights will be the maximum time allowed. Failure to observe these rules will result in that part of the range being withdrawn from the grazing area and possible removal of the stock from the reservation. The trailing of sheep into and out from a permanent bed ground will not be allowed. Bed grounds where possible will be located at least one-quarter of a mile from a running stream, spring, or other water.

19. Disposition of Carcasses.

The carcasses of all animals which die upon the reservation from contagious or infectious diseases must be burned at once, and the carcasses of all animals which die close to water, trails, or other places where they will be a nuisance must be removed immediately and buried or burned. The same extreme care should be taken when building or putting out a fire for burning a carcass as in case of a fire for any other purpose.

20. Salting of Stock.

When the forest or grazing officers shall require it all stock grazed under permit must be salted

(Testimony of Albert E. Stephenson.)

Plaintiff's Exhibit No. 1—(Continued)

regularly at such places and in such manner as may be designated. This rule applies more particularly to cattle but on some ranges may also apply to sheep. The use of troughs is advocated and these should be placed on rocky ground and well removed from water. Under no conditions will salt be placed at or near water. The proper use of salt on all ranges should aid in preventing stock from remaining too long at watering places and thereby permanently damaging [133] the feed. Stock will alternate between salt and water if the two are widely separated and will consume as much range around a salt ground as around a water hole.

21. Handling of Sheep.

The open-herding system of handling sheep should be used on all ranges where applicable. The principal points in this system are:

(a) Herding in the lead of sheep instead of in the rear, and training them to spread out and graze quietly.

(b) Grazing rather than driving when going to and from water.

(c) Bedding down the sheep on fresh bed grounds where night overtakes them, with proper selection of bed grounds so the sheep will be contented.

(d) Camping close to the sheep each night by using a burro or horse to pack the herder's food and bed, or packing the herder's outfit with a saddle horse from a central camp.

(Testimony of Albert E. Stephenson.)

Plaintiff's Exhibit No. 1—(Continued)

(e) Using dogs as little as possible after the sheep are properly trained and keeping dogs principally to protect the flock from predatory animals.

(f) Ewes with lambs will invariably graze around the bed ground before leaving. For this reason ewes and lambs should never be camped twice in the same place, if avoidable.

22. Protection of Game, Fish and Birds.

It is expected that herders and other employees will comply with the game laws of the State in which the reservation is located and will assist the forest, grazing, and State officers in the enforcement thereof, and they [134] will be required to comply with all regulations of the Indian Service regarding fish and game.

23. Range Improvements.

It is the policy of the Service to encourage the construction of improvements necessary for the proper management of livestock and the utilization of the range. Proper range improvements will make available much feed which could not otherwise be utilized. However, the cost of such improvements will be borne by the permittee unless otherwise provided for in the permit.

24. Condition of Camping Ground.

Camp grounds must be kept in a clean and sanitary condition. All rubbish, tin cans, etc., must be

(Testimony of Albert E. Stephenson.)

Plaintiff's Exhibit No. 1—(Continued)

properly burned or buried during occupancy or upon removal to new sites.

25. General Conduct.

These stipulations have been made for the assistance and guidance of permittees and become a part of their grazing permits. If faithfully carried out they will promote the best interests of all concerned. This fact should be recognized by livestock owners and a spirit of hearty cooperation maintained. The Service desires permittee who will work with the forest and grazing officers. Those who comply with the stipulations will be given every reasonable consideration consistent with good business management, while those who disregard them will be denied the privilege of further grazing upon Indian reservations.

26. Applicability of Stipulations.

The above range control stipulations are hereby [135] prescribed for use in all grazing permits except as special provision shall be made by the Commissioner of Indian Affairs.

27. Interpretation of Stipulations.

The final interpretation of these stipulations shall rest with the Secretary of the Interior.

DEPARTMENT OF THE IN-
TERIOR, OFFICE OF IN-
DIAN AFFAIRS, WASH-
INGTON.

(Testimony of Albert E. Stephenson.)

Plaintiff's Exhibit No. 1—(Continued)

Approved: May 29, 1931.

C. J. RHOADS,
Commissioner.

DEPARTMENT OF THE IN-
TERIOR, OFFICE OF THE
SECRETARY, WASHING-
TON.

Approved: June 4, 1931.

JOS. M. DIXON,
First Assistant Secretary.

Mr. Allan: We likewise offer Exhibit No. 2, the map in evidence.

Mr. McCabe: No objection.

The Court: All right, they may both be received in evidence.

Whereupon, Plaintiff's Exhibit No. 2 was received in evidence, which said exhibit is a map of the Blackfeet Indian Reservation and will be certified to the Court of Appeals under order of this Court. [136]

Q. Are you familiar with Mr. Connolly's cattle, that run on this permit to graze on the Blackfeet Indian Reservation? A. Yes.

Q. What is Mr. Connolly's brand, please?

A. Mr. Connolly's brand is a P. Y. on the cattle on the left hip, and on the horses it is on the left jaw.

(Testimony of Albert E. Stephenson.)

Q. Now, when you say P. Y. just make that more definite, as to the type. How is that shown to be?

A. The P and Y are connected, and the Y hangs down from the bottom of the P. It is made like this. (Showing the Court.)

The Court: It is a Y upside down.

A. It is a Y upside down.

Q. In other words, it is a regular form of P upright, and the Y is upside down, and they both connect together? A. Yes.

Q. So that it makes it look like a P standing on a stand with some supports. Is that correct?

A. That is right.

Q. Have you had occasion to inspect the range on the Blackfeet Indian Reservation as to trespassing of cattle at various times? A. Yes.

Q. In relation to the Connolly cattle, what particular day did you inspect the range?

A. Well, the first time that I inspected the range for Mr. Connolly's cattle, was October 21, 1941.

Q. And who accompanied you at that time?

[137]

A. Mr. Girard and Mr. Barrett.

Q. Who is Mr. Girard? A. Charles R.

Q. What is his business or occupation?

A. He is Range Guard at the Agency.

Q. And who is Mr. Barrett. What is his first name?

(Testimony of Albert E. Stephenson.)

A. Eugene W. Barrett, and at that time he was working for the soil and moisture operations as Junior Range Examiner.

Q. On the Blackfeet Indian Reservation?

A. On the Blackfeet Indian Reservation.

Q. And in company with these two men where did you go?

A. We went out in township thirty-five north, range nine west, and in Section eleven we observed horses belonging to Mr. Connolly in trespass.

Q. How many horses did you see at that time and place? A. Thirty-six head.

Q. Did you observe any cattle in that vicinity?

A. No cattle on that date.

Q. What was the next occasion that you had to make observation? A. On January 28, 1942.

Q. What, if anything, did you see at that time?

A. Sections three and four, township thirty-four, range nine west, observed twenty-two head of cattle in trespass.

Q. Who did those cattle belong to?

A. Mr. Connolly.

Q. Who accompanied you at that time. Mr. Stephenson? A. Mr. Girard. [138]

Q. The same Mr. Girard as you spoke about being with you on October 21, 1941? A. Yes.

Q. Any other time that you made personal inspection of the range, Mr. Stephenson?

A. On January,—there were two other earlier dates than that, January 27, 1942, in the company of Mr. Barrett, in Section ten, township thirty-

(Testimony of Albert E. Stephenson.)

four north, range eleven west, we observed eight head of horses on Connolly's in trespass, and on the same day eighteen head of cattle in Section four, township thirty-four north, range nine west. Then on January 16th, with Mr. Girard, we observed seventy-eight.

The Court: What was that answer?

A. Seventy-eight head of cattle, in Section two township thirty-four north, range nine west.

Mr. McCabe: Thirty-five, or thirty-four?

A. Thirty-four.

Q. Any other date that you made personal inspection, Mr. Stephenson?

The Court: Section twenty-two, was that?

A. Section two.

The Court: Township thirty-four?

A. Yes, range nine. On Monday of this week Mr. Girdard and I were out, and in Section sixteen, township thirty-four north, range nine west, we observed seven head of Mr. Connolly's horses, and three head of his cows, and in Section eighteen, township thirty-five north, range ten west, we observed nine head of his horses.

Q. Now, directing your attention to this map, Mr. [139] Stephenson, I would like to have you step over here and point out the various places that you have been talking about, where you observed these trespasses in relation to Mr. Connolly's Unit, upon which he has a right to graze; first of all, will you please point out where Mr. Connolly's Unit is?

A. Unit number twelve is here.

(Testimony of Albert E. Stephenson.)

Q. Where was the trespass that you observed?

A. In Section eleven, township thirty-five north, range nine west, this section right here. (Indicating.)

Q. How far distant would that be from Mr. Connolly's Unit?

A. About the line of section eleven, would be north of this north line of Mr. Connolly's Unit.

Q. What is the next spot of trespass?

A. Sections three and four; this section in here. (Indicating.)

Q. How far would that be from Mr. Connolly's Unit?

A. The north line of those two sections are adjudicated with his Unit in section eleven, thirty-four north, range nine west. The north line of that section is a mile south of the south line of Mr. Connolly's Unit. Then in section ten, it lays west of section eleven in thirty-four, nine, of thirty-four north, range nine west, that is also a mile south of his Unit.

Q. What is the next place?

A. Section four in township thirty-four north, range nine. His section there is adjudicated to the Unit line, and section two of this section here (illustrating), lays between section eleven, and the Unit, range Unit [140] number twelve.

Q. Now, are you familiar with a well that Mr. Connolly uses for the watering of his stock?

A. The well is right there. (Indicating.)

(Testimony of Albert E. Stephenson.)

Q. Where is that well located, Mr. Stephenson, please?

A. On the northwest corner of section ten, township thirty-four north, range nine west.

Q. And how far is the location of that well from Mr. Connolly's grazing Unit?

A. Little over one mile south of the Unit line.

Q. Have you ever observed any of Mr. Connolly's cattle watering at that well?

A. I never observed them watering there, I have seen them around the place.

Q. You actually seen them around the well?

A. Yes sir.

Q. What is the lease that Mr. Connolly has, what is,—How many head of cattle or horses does it provide for. That is the permit, I should say.

Q. The permit on the Indian land covered by the permit calls for one hundred and fifty-three head of cattle, and then this off and on clause, where consideration is given for his deeded and otherwise controlled land in the Unit, a total of two hundred and forty head of cattle are permitted on the year around basis.

Q. Mr. Connolly's cattle to your knowledge grazed upon the Blackfeet Indian Reservation the year around, or are they taken off the Reservation at times?

A. They are on the Reservation the year around.

Q. To your knowledge does Mr. Connolly take care of [141] cattle for other people?

A. He has.

(Testimony of Albert E. Stephenson.)

Q. Has he at any time since the commencement of this action taken care of other people's cattle?

A. Yes.

Q. When was that. How many cattle does that consist of?

A. Last year Mr. Connolly took in some cattle for some gentleman down by Conrad, but we did not get the actual count. We didn't get an actual count on those cattle. I don't know just how many there were of them.

Q. Can you give an approximate account of them?

A. Approximately forty-five head.

Q. Did he take care of any other cattle on this Unit to your knowledge?

A. To my knowledge he took no more in since the beginning of this action.

Q. No, I mean at the time of this action, and prior to the action itself after the permit was issued to him?

A. It is my understanding that he——

Mr. McCabe: Just a minute. We object to any understanding, but it must be within his knowledge, within his own knowledge.

The Court: Yes, sustain the objection.

Q. Of your own knowledge?

A. To my own knowledge, I was not there on duty prior to August 1941, and as far as I know he had no cattle after my coming on in 1941, after I came on duty. [142]

(Testimony of Albert E. Stephenson.)

Cross Examination

By Mr. McCabe:

Q. Mr. Stephenson, directing your attention to plaintiff's exhibit number one, which has been received in evidence, I believe you stated the amount shown is two hundred and forty head of cattle?

A. Yes.

Q. And as I understand from that you meant that he had the right under his permit, as construed by your office, to graze two hundred and forty head of cattle on this Unit which you have indicated on the map exhibit two, as Unit twelve? A. Yes.

Q. And as I understand from that you meant that he had the right under his permit, as construed by your office, to graze two hundred and forty head of cattle on this Unit which you have indicated on the map exhibit two, as Unit twelve?

A. Yes.

Q. And in counting and in estimating, the two hundred and forty head of calves are not counted, that is, calves under six months of age?

A. That is right.

Q. Now, in addition to the land which Mr. Connolly had, the grazing permit to which you have testified as exhibit number one, he was the owner of other land in that area, was he not. He was the owner of other land that you know of?

A. Not within that particular area, no sir.

Q. South of that area over on Cut Bank Creek, a distance of around three or four miles, he had

(Testimony of Albert E. Stephenson.)

some land there upon which he had the right to graze cattle on? A. Yes.

Q. And then likewise over on Willow Creek, a distance of six or seven miles, possibly eight miles, he had other land upon which he had a right to graze cattle? [143] A. Yes.

Q. Don't you know off-hand of your own knowledge how many acres Mr. Connolly had altogether under his control, and on which he had the right to graze cattle and horses?

A. There was some deeded land involved there, which Mr. Connolly claimed, and which we have no reason to question. I have it pretty well in mind.

Q. And approximately ten thousand acres. Is that correct?

The Court: You mean ten thousand acres on the Indian Reservation?

Mr. McCabe: Yes.

The Court: That he owned or controlled?

Mr. McCabe: Yes.

The Court: Beside Unit twelve?

Mr. McCabe: Not including Unit twelve.

The Court: What is the acreage in Unit twelve?

Mr. McCabe: I think five thousand seven hundred acres, are shown on the exhibit, five thousand seven hundred and sixty acres in Unit twelve.

The Court: Aside from that he has four thousand three hundred acres too.

Mr. McCabe: Approximately. We will introduce the exact acreage.

Mr. McCabe: Q. Is that correct?

(Testimony of Albert E. Stephenson.)

A. It seems a little high.

Q. Somewhere, nine to ten thousand?

A. Yes.

Q. Now, Mr. Stephenson, how long have you been [144] Supervision on the Blackfeet Indian Reservation? A. Since August, 1941.

Q. Since August, 1941? A. Yes.

Q. And prior to that time who was in charge?

A. Mr. Henry Wershing.

Q. Is Mr. Wershing in the country, or has he been moved to another location?

A. He has been moved.

Q. On these permits of the character of permit number one, or exhibit number one which has been introduced in evidence, that contemplates a grazing period of twelve months to the year, does it not. That is correct, is it not? A. Yes.

Q. And under the construction of these permits, the policy of your office is that if a person does not want to graze the permit for the full twelve months, with the maximum amount of cattle referred to in the permit, he has the privilege of increasing the number proportionately to the number of months that the grazing is reduced?

A. That is not the policy, no. It has been allowed, but it is not the policy.

Q. Isn't it a fact that in the permit, in some of these permits they have a provision expressly—

A. No.

Q. They have not? A. No.

(Testimony of Albert E. Stephenson.)

Q. I believe you stated that Mr. Connolly's brand [145] is P with a Y being below, and attached to the left hip for cattle, and the same brand on the left shoulder for horses? A. Left jaw.

Q. I beg your pardon. I misunderstood you. Now, the first time that you went out to inspect the range, as you stated, for trespass of cattle, I think it was October 21, 1941, in company with Mr. Girard and Patterson? A. Mr. Barrett.

Q. I will stand corrected. And you went over into township thirty-five north, range nine west in section eleven? A. Yes.

Q. And in fixing that as section eleven in township thirty-five north, range nine west, how did you identify that ground, on the ground out there, as being section eleven, township thirty-five north, range nine west?

A. By the location of the allotment pins.

Q. And whose allotment pins did you so locate at that time?

A. It was the allotment of Emma C. Blood.

Q. And how many acres in her allotment?

A. I would have to check the plat book.

Q. Just approximately?

A. I think it is three hundred and twenty.

Q. And is there some other allotment in there, in that section eleven?

A. Yes, Mollie Blood.

Q. How do you spell that? [146]

A. M-o-l-l-i-e.

(Testimony of Albert E. Stephenson.)

Q. Blood? A. B-l-o-o-d.

Q. And approximately how many acres did she have?

A. I believe three hundred and twenty.

Q. Whose else allotment was in that section that you identified at that time?

A. As I recall it those two three hundred and twenty's that would be the complete section.

Q. Oh yes, I beg your pardon. I was thinking of one hundred and sixty acres each. Do you recall upon which of these allotments the cattle that you observed at that time were grazing?

A. As I recall they were scattered over both of them.

Q. They were located on both of them?

A. Yes.

Q. Can you give us approximately the number of head that was on the Emma C. Blood allotment?

A. No, there was no,—both of them being Indian land, there was no attempt made to find whether they were on the Emma C. Blood, or the Mollie Blood land. They were both Indian land,—both being Indian land. They were on one or the other.

Q. You say there were this number of head on that part of the ground in section eleven?

A. Yes.

Q. Do you recall at this time about what part of the section you located that stock on?

A. No, I don't recall, but I can refer to the plat book, it might give a picture of it. I don't recall [147] it right now.

(Testimony of Albert E. Stephenson.)

Q. How long were you on that tract of land at the time?

A. Oh, probably three-quarters of an hour.

Q. And in making the count, did you use one of these counting machines, or how did you count them?

A. No, we counted them, kept track of them in our minds. Each of us made our count and compared our totals.

Q. Each made an individual count?

A. Yes.

Q. When did you next return to that particular section?

A. Oh, I don't recall whether I went back to that particular section at any time since.

Q. As I understand then, you don't know just how long these particular cattle had been grazing upon that particular section?

A. No, sir.

Q. Or how long after you left there they continued to graze on that section? A. No.

Q. You don't know? A. No.

Q. Now, turn to the next place where you located the cattle or horses, or whatever they are?

A. On January 28, 1942.

Q. And that was after this action was instituted, was it not? A. Yes.

Q. And at that time did you identify the section number by the allotment pins? [148] A. Yes.

Q. Whose allotments were embraced in that?

(Testimony of Albert E. Stephenson.)

A. I would have to refer to the plat book on that, as I did not put that in my notes.

Q. Well, to shorten the examination, I will ask you if you can state from referring to the plat book the names of all of the allottees who have land in Unit number twelve?

A. All the allottees in Unit number twelve?

Q. No, not number twelve, but these other Units that you have testified to?

A. Yes, all the allottees are shown.

Q. I wish you would give me the names of them and the number of acres, please?

The Court: You mean the amount of acreage of the allottees on the land upon which the witness has testified the cattle were grazing, outside the Unit twelve.

Mr. McCabe: Yes, your Honor.

A. Well, the allottees in section three, township thirty-four north, range nine west are Barney Calf Boss Ribs; he has two lots there, one of them figures 39.77 acres. The other is 39.87 acres. Dan Calf Boss Ribs,—

Mr. McCabe: I think I can shorten this a little further. Could you just take a piece of paper and figure out the total acreage and the names of the allottees of land in that area where you saw the cattle trespassing, just the total acreage and the names of the allottees. You don't have to separate them. I want the names of the allottees, and the total acreage embraced in the allotment of the allottee? [149]

(Testimony of Albert E. Stephenson.)

A. I don't know whether I quite understand what it is you want, Mr. McCabe.

The Court: If you have an idea, showing permits, or anything of that sort, to graze on these allotments, you would have to separate them would you not, to show the difference?

Mr. McCabe: Yes, I thought I could, but maybe we better separate the allotments.

The Court: If that is your purpose.

Mr. McCabe: It is the purpose, your Honor, one of the purposes, your Honor.

The Court: Cannot you go ahead and go through that, and put it on a piece of paper and give it to counsel. That will save their giving the name and the description of the property grazed over, outside of Unit twelve, belonging to the allottees.

Mr. McCabe: And the number of cattle. I think the number of cattle grazed upon that particular tract, because that will reflect on the damages in this case.

The Court: Yes.

Q. Mr. Stephenson, in this area where these tracts or Units, range Units are located which you have identified on plaintiff's exhibit number two, there are quite a number of stockmen running sheep and cattle in that general area, isn't there?

A. The majority of them is sheep.

Q. The majority is sheep? A. Yes.

Q. And adjoining Unit number twelve, all

(Testimony of Albert E. Stephenson.)

around there, [150] are there range Units that have been leased to other persons?

A. All the range Units are leased to other people.

Q. So that, as I understand, all the land on the Blackfeet Indian Reservation in the general area of the location of Unit number twelve, which we will call the Connolly land, there are stockmen running cattle and sheep? A. Yes.

Q. Now, is this area fenced, or is it open prairie land, grazing land?

The sheep ranges are open. The bulk of the cattle ranges on the Reservation are fenced.

Q. The bulk of the cattle ranges? A. Yes.

Q. When you say fenced, do I understand you to say that they are surrounded by fence, each of the cattlemens' holdings, or range Units?

A. Yes, sir.

Q. Are all surrounded by fence? A. Yes.

Q. And have you examined those fences, the state of repair particularly the period of time from August of 1941, up to the time and during the time that you saw the cattle of Mr. Connolly on the various Units?

A. I haven't examined each individual fence.

Q. Your statement then that all the holdings of the cattle men who are entitled to run their cattle on the Reservation is fenced, is that based on your own knowledge, or from what somebody told you?

[151]

A. It is based on my own knowledge.

(Testimony of Albert E. Stephenson.)

Q. You have examined the area as to fences. What kind of fences are they?

A. Barbed wire fence.

Q. Is it one, two or three strand barbed wire?

A. I think three strand is the common rule.

Q. What kind of posts?

A. I don't know. I believe some of them are, or most of them are split cedars.

Q. How far apart? A. Probably a rod.

Q. During the period of time in which you saw Mr. Connolly's cattle as you say on these different tracts of land, how long before that had it been since you examined the fences around these allotments, cattle allotments?

A. When I first saw them, I don't believe I examined any of them, I had not been on the Reservation but a very short time.

Q. So that your testimony with reference to the fencing relates to a time after the commencement of this action? A. Yes, sir.

Q. How long after the commencement of this action does your testimony relate, approximately?

A. The first fence Units that I have knowledge of was in November.

Q. Of 1942? A. No, of 1941.

Q. 1941? A. Yes, sir. [152]

Q. Possibly I misunderstood you. I thought that you said that you had not examined the area for fences until after the commencement of this action.

(Testimony of Albert E. Stephenson.)

A. I was thinking this action was commenced in November, 1941.

Q. Well, I think it was the 22nd of November. So that it was after this action was instituted?

A. Some time in November when I first observed the fenced Units.

Q. And was after this action was instituted?

A. It probably was.

Q. Now, the purpose of issuing these Units by the Government is to have the lease used for the purpose of ranging, in other words, to get the full benefit of the range for grazing of livestock on the Reservation? A. Yes.

Q. Of course, when you issue a permit, or a lease for grazing purposes to certain Units, to limit the number of stock you will permit on that Unit to the estimated carrying or grazing capacity of the range for the particular class of stock that you were issuing the permit for?

A. Yes, that is right.

Q. And in issuing these permits, you keep in mind more or less the fact of the various rights of the surrounding stockmen and their grazing rights in issuing the permit?

A. Most of the permits are issued, so far as the white operators are concerned, are issued as the result of advertising and competitive bidding. [153]

Q. What I mean is that in issuing them you have in mind, and the knowledge that there are other men who have certain rights, and grazing rights

(Testimony of Albert E. Stephenson.)

in the area to a certain number of cattle and a certain number of sheep?

A. On a certain range Unit, yes.

Q. You are also acquainted with the fact, your office, that it is a natural characteristic of livestock, and particularly cattle and horses to stray of their own inclination over unfenced areas of land in searching for feed and water, or as the result of storms, or being driven by various agencies. You are familiar with that? A. Yes, sir.

Q. And that is the condition that you have in mind when permits are issued, the general characteristics of cattle, and the custom of stockmen in that neighborhood with reference to grazing the cattle? A. Yes, sir.

Q. And as a matter of fact it is the policy of your office not to consider as trespass any cattle which may inadvertently follow their natural proclivities, or inclination to stray from one unit to another, but which are returned by the owner of the unit?

A. That depends on how much diligence the owner puts out to return them.

Q. With reference to these number of cattle that you saw grazing, Mr. Connolly's how long did you observe that those cattle remained on the particular unit, what is the longest period that you saw them there? [154]

The Court: You mean on one particular allotment?

(Testimony of Albert E. Stephenson.)

Mr. McCabe: Yes, on any part of that particular tract where you saw them?

A. I did not have the time to stay out on the hill and wait for them to move. We just observed them in one place, and go out and count them, and the next time they would be in the general vicinity, or be some place else.

Q. You don't know what effort the owner in the meantime may have exerted to take them back on to their own range?

A. Not definitely.

Q. You know that it is the custom of stockmen, cattle and sheep men to keep their own cattle on their own range, and try to keep the other man's cattle off that range. That is true up in that area, is it not?

A. In that particular area where these are involved, there is no large amount of cattle right in that area. It is all sheep that is around on it.

Q. In making your investigations on the days that you did, that you observed Mr. Connolly's cattle in that area, did you observe any cattle bearing other brands than his? A. No.

Q. And so that I may understand you, and be correctly advised, then at no time when you went out and observed Mr. Connolly's cattle grazing on any of the land described by you in your testimony, did you see any cattle or horses or sheep grazing that same area? [155]

A. If you put it that way, yes.

(Testimony of Albert E. Stephenson.)

Q. So, how many cattle did you see grazing in that area at that time, other than Mr. Connolly's?

The Court: "That area." You must be fair with the witness. That might not be a very comprehensive question to the witness. Describe it more definitely.

Mr. McCabe: I will.

Q. On the allotments that you examined at that time, how many other cattle did you see grazing on those allotments?

A. Do you refer to the groups of cattle that we counted in trespass, I don't recall noticing any other brands other than Mr. Connolly's in the bunch. However, there were some that we omitted because we could not definitely identify the brand on them.

Q. So that there were other cattle. How many head then would you say were grazing up on that particular allotment?

A. I couldn't say. It all depends on the particular bunch of cattle?

Q. You made no count of these particular cattle grazing at that time?

A. We presumed that they were——

Q. Just answer my question. You made no count?

A. No, we just skipped those cattle there, we could not identify the brand.

Q. Did you count any other cattle than Mr. Connolly's cattle on those occasions?

A. Not at that time, no.

Q. At that time did you see any sheep, or any horses [156] grazing?

(Testimony of Albert E. Stephenson.)

A. Not on the particular land where the cattle were, on the particular allotment, no.

Q. Did you see any horses?

A. Not on those particular lands.

Q. So that at no time did you see sheep or horses grazing upon those allotments, when these cattle of Mr. Connolly's were grazing upon this land?

A. No.

The Court: You did not count the other brands because they were hard to determine?

A. We couldn't identify them by the brands.

The Court: Because they were small in numbers? A. Yes.

The Court: There were very few, you meant to say? A. Yes.

Mr. McCabe: Q. Mr. Stephenson, it is the policy of your office with respect to these various grazing Units, that where the person that has the right to graze the Unit makes no objections to stock coming over and entering upon the lands, you leave that as a matter between the various persons who are entitled to the grazing right in that area. Is that true?

A. No, that is not true. That is not the policy. The Units are set up, the carrying capacity. Unit lines are established, and we expect more or less conformity to those lines, in order that we can keep *tract* of the stock on the Units.

Q. Did you ever have any complaint from any of these [157] men concerning Mr. Connolly's cattle on these lands, or Units? A. No.

The Court: What do you mean, the allottees?

(Testimony of Albert E. Stephenson.)

Mr. McCabe: Well, the men who are entitled to these grazing permits out on these other Units.

A. I would not exactly call them complaints. I have had them call my attention to the fact that they had been out there in trespass.

Q. What did they say to you, substantially?

A. I don't remember exactly what they did say.

Q. You don't remember? A. No.

Whereupon a recess was had.

After Recess

Q. Mr. Stephenson, under the rules and regulations relative to grazing on the Blackfeet Reservation, the Indian has the privilege of taking outside stock, that is stock other than his own, and grazing them upon any lands for which he has been issued a permit, providing he has the approval of the Indian Office at Browning to do so. That is true, is it not?

A. That is right, yes.

Q. And you testified about forty-five head from a man at Conrad. Did I understand you correctly?

A. Yes.

Q. And that was before this action was instituted? A. No, after.

Q. Oh, after the action was instituted?

A. Yes. [158]

Q. You testified about a well for watering stock in the northwest corner of section ten, township

(Testimony of Albert E. Stephenson.)

thirty-four north, range nine west, used by Mr. Connolly. Do you recall your testimony?

A. Yes.

Q. That is an open watering place, is it not where any cattle in the area have the right to go to water?

A. Any stock that has the right to be on the area has a right to go there to water.

Q. Isn't it true that under the grazing regulations in effect on the Blackfeet Indian Reservation that you have to keep your water holes open for watering stock generally; that you are not permitted to close off a water hole?

A. Watering stock that are entitled to be on that area.

Q. By that area, do you mean on that particular Unit, or in the general area accessible to the water hole?

A. On the particular range Unit on which the water hole happens to be located.

Redirect Examination

By Mr. Allan:

Q. Just to straighten up that point, were Mr. Connolly's stock entitled to go down to this well to water?

Mr. McCabe: To which we object on the ground that it calls for the conclusion of the witness.

The Court: I don't know. He has testified. You have both brought out everything with respect to the permit that you thought material, whether it was grazing. If he knows, if the permit covered

(Testimony of Albert E. Stephenson.)

that. [159] Does the permit cover that feature of the case, or where they used the water holes, or watering places.

A. The permits set out the area on which the stock were permitted to graze, yes.

The Court: Is there any customary regulations with respect to them going on for the purpose of watering stock.

A. If it is necessary for a border liner, to use it for both grazing units to use the same water, then an adjustment of the lands are made to permit that.

The Court: That is under the direction and approval of the Indian Office?

A. Yes.

The Court: I see. I wanted to straighten that out.

Mr. Allan: Q. Relative to the stock that an Indian Permittee is allowed to take in, must that stock be within the numerical number contained in his grazing permit? A. That is right.

Q. Referring to the various permits on which you noticed the trespass, that you testified to here before, Mr. Stephenson, were all of these allotments within the administration jurisdiction of your office, the Blackfeet Indian Agency?

A. Yes, they were.

Q. In other words, had any of these allotments held by the Indian allottees without the authority of your office to administer them?

A. No, none of them had. [160]

(Testimony of Albert E. Stephenson.)

Q. It was during the year 1941, after 1940, 1941, what was the annual grazing cost for one horse on the Blackfeet Indian Reservation?

A. It averaged four dollars and fifty cents a year for a horse.

Q. And what was the average grazing cost for one cow? A. Three dollars and sixty cents.

Q. You spoke about Mr. Wershing being your successor in interest up there. Do you know personally where Mr. Wershing is at the present time?

A. Yes, I understand he is in the armed forces.

Q. Have you had any conversation since you have been assigned to the Blackfeet Indian Reservation with the defendant, Mr. Connolly, about the grazing of his stock? A. Yes, I have.

Q. What were these conversations, please?

A. First time I met Mr. Connolly after I came on duty, it was a few days after I came on duty, he came into my office and we talked over this trespass situation, and I advised him then that it would be necessary to restrict his cattle, at least a whole lot more than they had been in the past to the area that was permitted to him.

Q. Did you explain to Mr. Connolly that you were sent there to enforce the rules and regulations of the Indian Department about the grazing of cattle on the Blackfeet Indian Reservation?

A. Yes.

Q. Did you ask for his co-operation in these matters? [161] A. Yes, I did.

(Testimony of Albert E. Stephenson.)

Q. What, if anything, did Mr. Connolly tell you about that?

A. Mr. Connolly seemed to me——

Mr. McCabe: We object to that. You confine your testimony to the statement made by Mr. Connolly.

The Court: Yes.

Q. Just give the facts.

A. Mr. Connolly told me then that those were Indian stock; that they could run anywhere on the Reservation that he wanted them to.

Q. Now, in relation to the grazing that is allowed on the Blackfeet Indian Reservation, Mr. McCabe as counsel for Mr. Connolly questioned you as to the policy of protecting the range. As I understand it, just to shorten this matter up, the whole Blackfeet Indian Reservation is worked out in grazing units, is it not?

A. Yes, that is right.

Q. And the duty that the land will carry for stock is worked out? A. Yes.

Q. And that is the policy that you were talking about at that time? A. Yes.

Recross Examination

By Mr. McCabe:

Q. Mr. Stephenson, did you as an officer, or in your personal capacity, ever make a count of the Brian Connolly cattle, owned by him and grazing on the [162] Indian Reservation?

A. No, I never made a count.

Q. You never made it? A. No, sir.

(Testimony of Albert E. Stephenson.)

Redirect Examination

By Mr. Allan:

Q. Right along that same line, have you ever checked the records to determine the number of cattle that Mr. Connolly has on the Indian Reservation?

A. Yes, I checked the records of the county. I checked the mortgage covering his livestock.

Q. What did that show?

Mr. McCabe: To which we object on the ground that it is not the best evidence. That the county record is the best evidence as to any personal assessment made, or any list, to identify the record and to show that it is a proper public record.

The Court: Yes, get a copy of the record, and see whether it corresponds, then we will have both sides.

(Witness excused.)

Whereupon

CHARLES GIRARD,

a witness called and sworn on behalf of the Government, testified as follows:

Direct Examination

By Mr. Allan:

Q. Please state your name?

A. Charles Girard.

Q. What is your business or occupation?

(Testimony of Charles Girard.)

A. Assistant Range Guard at the Indian Service.

Q. And to what particular Reservation are you assigned? A. Blackfeet. [163]

Q. How long have you been in that capacity of Range Guard on the Blackfeet Indian Reservation? A. Five years.

Q. Do you know Brian Connolly, one of the defendants in this action? A. Yes.

Q. Do you know his son? A. Yes.

Q. What is his son's name, please?

A. Daniel.

Q. Dan Connolly? A. Yes.

Q. I believe that in the course of your official duties, you have had occasion to inspect the range for cattle that were found on the range at various times? A. Yes.

Q. In relation to the Connolly cattle, did you have occasion to make an investigation on August 6th, 1941? A. Yes.

Q. Who accompanied you at that time, Mr. Girard? A. Mr. Wershing.

Q. That is Henry F. Wershing? A. Yes.

Q. Who was formerly in the Indian service, and who is now in the United States Army?

A. Yes.

Q. What, if anything, did you observe on the range with reference to the Connolly cattle?

A. I counted forty-eight head of horses. [164]

Q. Where did you count these horses?

(Testimony of Charles Girard.)

A. Twenty head of horses were on Sections 23, 24, 25, 26 and 27, and 34 in township thirty-five north, range ten.

Q. And what brands did these horses have?

A. P. Y. on the left jaw.

Q. That is the P. Y. brand that we have been discussing here before? A. Yes.

Q. Then what about the cattle. Did you observe any cattle at that time and place?

A. Yes, there was also twenty-eight head of horses in that count too. There was forty-eight altogether. There was twenty-eight head in sections three and ten, township thirty-four, range nine.

Q. Does that cover all the horses?

A. That covers all the horses.

Q. How about the cattle?

A. Twenty-five head of cattle were in sections eleven and fourteen, township thirty-five, range nine.

Q. And directing your attention to the inspection that you made on July 24, 1941, I will ask you who accompanied you at that time?

A. July 24th, 1941, Mr. Eugene Barrett.

Q. What was Mr. Barrett's capacity?

A. He was Assistant Range Guard.

Q. And what, if anything, did you observe then?

A. Twenty-five head of horses in sections twenty and twenty-one, of township thirty-five, range nine.

Q. Then on August the 21st, did you have occasion [165] in 1941,—did you have occasion to

(Testimony of Charles Girard.)

make another inspection October 21st, I should say?

A. October 21st.

Q. Who accompanied you at that time, Mr. Girard?

A. Mr. Eugene Marrett.

Q. Anyone else?

A. And Mr. Stephenson.

Q. Mr. A. E. Stephenson?

A. Mr. A. E. Stephenson.

Q. What, if anything, did you see then?

A. Thirty-six head of cattle, part of which were branded P. Y. on the left hip, and A. X. on the left hip.

Q. Are you familiar with the brand A. X. on the left hip?

A. That is Dan Connolly's brand.

Q. Is that the son of defendant Connolly, Brian Connolly?

A. Yes sir.

Q. Have you at any time ever observed cattle of other people running with the Connolly cattle?

A. There were seventy-five or seventy-eight head of Mr. Swanson's cattle.

Q. What time did they run with the Connolly cattle?

A. In the summer of 1942.

Q. Any other person's cattle?

A. Mrs. Jessie G. Sinclair.

Q. How many head of cattle of hers did you observe?

A. One hundred head.

Q. And during what period of time was that?

[166]

A. That was the summer of 1942.

(Testimony of Charles Girard.)

Q. Any cattle belonging to any other person, did you notice there?

A. Only the Ryan cattle from Conrad.

Q. And how many head of Ryan cattle?

A. Oh, there were somewhere around forty-five head.

Q. And during what period of time did they run on the range?

A. I have to refer to the count record that I made on some of those.

Q. It is the official record of the Department that you want to refresh your recollection on. Is that correct?

A. Yes sir.

Q. And what does that show you now?

A. Well, the cattle, the man's name was not Ryan, it was Payne. Forty-two head.

Q. During what period of time did they run with the Connolly cattle?

A. They were brought up in April, 28th; they run during the summer season.

Q. What year?

A. 1942.

The Court: You say they were brought there. Who brought them up there?

A. Mr. Payne brought them up to the Connolly range.

Q. *What* was Payne instead of Ryan. You made a mistake in those names?

A. Pardon.

Q. That was Payne instead of Ryan. You made a [167] mistake in those names. Is that correct?

A. Yes.

Q. And on the Sinclair cattle what year did you say that was. Was that in 1941 or 1942?

(Testimony of Charles Girard.)

A. I don't have the notes on it.

Q. I think the record will show that was 1941?

A. 1941. I don't have the record with me.

Cross Examination

By Mr. McCabe:

Q. Mr. Girard, you stated that Mr. Payne brought some cattle to the Connolly ranch in 1942, in April 1942? A. Yes.

Q. And did you see Mr. Payne bring them to the ranch? A. Yes.

Q. And what ranch did he bring them to?

A. He brought them to the Connolly ranch on the Milk River,—no, on Willow Creek.

Q. Milk River?

A. No, Willow Creek it is.

Q. And at the time you observed these cattle on the location concerning which you have testified to, did you see other cattle and horses running on the same lands, or the same allotment?

A. I seen some of Mr. Connolly's brand out there. Some of Mr. Connolly's cattle there and horses.

Q. Besides Mr. Connolly's, and his brand, did you see any other cattle running on these allotments when you observed Mr. Connolly's cattle?

A. There was a few there. There was a few head of [168] Chet Kmbalil's but that was on patented land.

Q. Were the cattle of Mr. Connolly's that you saw there on patented land?

(Testimony of Charles Girard.)

A. They were unloaded there and later moved to the Unit twelve.

Q. They were unloaded on patented land and then moved to Unit twelve?

A. Yes, and there is allotted land in connection with the patented land.

Q. You say they were unloaded as I understand it, on patented land?

A. I never checked the location where they were unloaded, but they were unloaded in the vicinity of his ranch where the buildings were.

Q. You mean the Milk River ranch?

A. On the Willow Creek ranch.

The Court: He said Willow Creek.

Mr. McCabe: Oh, Willow Creek ranch?

A. Yes sir.

Q. And whose cattle did you say those were?

A. Payne's cattle.

Q. You were informed as an Officer of the Indian Department that those cattle were going to be unloaded at that place at the time, were you not?

A. Yes.

Q. In this area where you observed the cattle which Mr. Connolly had, which had Mr. Connolly's brand on, or the cattle which bore Mr. Connolly's brand, did you see any horses or sheep belonging to other persons grazing in that area, or along on the same lands, or [169] on the same allotment?

A. That belonged to anybody else?

Q. Yes, did you see sheep or horses other than those bearing Mr. Connolly's brand grazing on the allotments?

(Testimony of Charles Girard.)

A. Well, the sheep were on the Units where they were supposed to be.

Q. That is, you say there were sheep grazing on the same Unit?

Mr. Allan: We object to this line of testimony. If counsel is trying to show there are sheep in the country, because there are undoubtedly sheep where they belonged as the witness has just testified.

The Court: I think he ought to make it more definite; he ought to inquire whether the witness saw sheep or cattle bearing other brands than the Connolly brand, on the particular sections where he has described the Connolly horses and cattle were running when he made his inspection.

Mr. Allan: Even if there were other trespasses, it makes no difference.

The Court: No, he is trying to establish a general trespass, running anywhere and everywhere. I should think that was the trend of it.

Mr. McCabe: In other words, the defendant is charged with committing so much damage. I am trying to show there were other cattle there running on the area.

The Court: We will take care of that later on.

Q. Now, Mr. Girard, at the time when you saw cattle and horses carrying the brand of Dan Connolly or Brian [170] Connolly on the particular land where they were grazing, and by the particular land I mean the particular allotments embracing the land upon which the cattle or horses were graz-

(Testimony of Charles Girard.)

ing, were there other sheep or horses or cattle grazing on those same allotments?

Mr. Allan: That is objected to as immaterial; not pertaining to any issue involved in this case.

The Court: I will let it go in under your objection. You may answer the question.

A. There were sheep in the same vicinity, but they had a right to be there because the Unit was leased to the man that was running the sheep, and they had a right to be there.

Q. Were there also cattle and horses that had a right to be there grazing upon the same land?

A. No.

Q. Just sheep?

A. Yes. The sheep had a right to be there, the cattle and horses did not.

Q. Was there any other stock that had a right to be grazing upon that particular area, or on that particular allotment, grazing there at the time?

A. No sir.

Q. So that the only things that were grazing there were sheep, they were rightfully and lawfully on that allotment?

A. The sheep had a right to be there.

The Court: What do you mean, that the sheep had a right to be there?

A. The land that is in discussion here is within a [171] Unit which is a sheep Unit, and the Connolly horses and the Connolly cattle were in trespass on that Unit, if I get the question.

The Court: All right, I understand.

(Witness excused.)

EUGENE W. BARRETT,

a witness called and sworn on behalf of the Government, testified as follows:

Q. Will you please state your name?

A. Eugene W. Barrett.

Q. What is your business or occupation?

A. At the present, or at the time that this action was instituted?

Q. Cover the whole matter. What is your present occupation or business?

A. I am Assistant Range Examiner on the Rosebud Indian Reservation in Rosebud, South Dakota.

Q. How long have you been engaged in that capacity? A. About six months.

Q. Before that, what were you doing?

A. I was Examiner, I was Junior Range Examiner with the soil and moisture conservation operations on the Blackfeet Indian Reservation.

Q. How long were you on the Blackfeet Indian Reservation?

A. Approximately twenty months.

Q. Were you there during the season of 1941?

A. Yes sir.

Q. Did you have occasion to make inspections on August the 8th, 1941, relative to cattle grazing, matters of that kind? A. Yes sir.

Q. With whom were you associated? [172]

(Testimony of Eugene W. Barrett.)

A. Mr. Girard.

Q. What, if anything, did you see on August 8th, 1941, with relation to the southwest quarter of the northeast quarter, township thirty-two north, range nine west?

A. May I ask you to repeat that again. It is some time ago, I will have to refresh my recollection.

Q. That is the southwest quarter of the northeast quarter of section thirty-two, range nine west?

A. Mr. Girard and I counted two head of cattle on section twenty-two, thirty-four, nine; twenty-three head of cattle on section sixteen, twenty-one, thirty-five, nine, and twenty-five head of horses on section eleven, thirty-five, nine.

Q. Now, do you know where the Blood allotments are located? A. Yes, sir.

Q. Did you do any particular work on the Blood allotments? A. Yes, sir.

Q. What was the type of work that you were doing on the Blood allotments?

A. With the Court's permission, I will explain what I was doing. I was sent to the Blackfeet as a technician on range management with chief concern for the conservation of soil, moisture and grasses. In order to establish a basis for our survey, I took it upon myself to keep track of the cattle as we saw them on the Reservation, and *now*

(Testimony of Eugene W. Barrett.)

knowing who had the Units at the time, or anything about it, I jotted down a few notes and when we would come back in the office, why [173] we would find out to see whether or not that stock was where it rightfully belonged. I was conducting a survey for range improvement and a summary of the condition of the range. My copatriot was examining the soil and classification of agricultural or non-agricultural soil at that time.

Q. How often were you on the Blood allotments that you have referred to?

A. I imagine we passed through the Blood allotments, traveling through our respective areas every day for two weeks.

Q. About what time of the year was that?

A. That was during the summer of 1941.

Q. Around what month would it be?

A. Oh, I imagine it was some time in July or August and September; somewhere in there.

Q. And how often did you see the Connolly cattle on that Blood allotment?

A. May I make a general statement to that effect?

Mr. McCabe: I think he should be limited to answer the question, what he saw, the number, and what the brands were.

The Court: He traveled over the Blood allotments every day for two weeks. How many cattle did he see during the time he traveled over them. Was that two weeks continuous? A. Yes.

(Testimony of Eugene W. Barrett.)

The Court: What did you mean by saying July, August and September?

A. Those were the months, if I may explain, we [174] covered the entire Reservation during that summer.

The Court: Oh, I see. These two weeks you were on the Blood allotments.

A. We would go through that area.

Q. Now then, tell us?

A. I would say every day that I passed through that area I saw horses and cattle on the Blood allotments.

Q. Did you identify any of these horses?

A. On one or two occasions, yes.

Q. What did you determine to be their *identify*?

A. They were chiefly Connolly horses, and I can probably check on the affidavits to that effect. Would you like me to do that?

A. Please check the affidavits, and refresh your recollection.

A. There is an affidavit by myself as of August 20, 1941. On the day of August 13th, about four o'clock in the afternoon in the company of Darrell Young, my associate, we counted thirty-two head of horses bearing the P. Y. brand on the left jaw; thirty-two horses were on the south half of section eleven, thirty-five, nine.

Q. Is that the Blood allotment?

A. I believe it is. I think there is a reservoir there that identifies it as such.

Q. Then directing your attention to the partic-

(Testimony of Eugene W. Barrett.)

ular date of August the 13th, I will ask you what, if anything, you observed or saw with reference to the Connolly cattle on that date, Mr. Barrett?

A. I presume that is the one that we just talked about. [175] The date was August 13th, the affidavit was sworn to August 20th.

Q. We have covered August the 8th, haven't we?

A. Yes.

Q. And August the 13th? A. Yes.

Q. Now, referring to the date of October 24th?

A. Yes.

Q. I will ask you where you were on that date?

A. I was in company with Mr. Stephenson and Mr. Girard, inspecting ranges.

Q. And in what particular part of the country were you?

A. It was in the vicinity of Emma C. Blood's allotment.

Q. Is that on the Blackfeet Indian Reservation?

A. Yes, that is the allotment that we have been talking about.

Q. What, if anything, did you see there?

A. We counted thirty-six head of cattle, part of which were bearing the brand P. Y. on the left hip, and the rest of the cattle, of that thirty-six head were branded A. X. on the left hip; that A. X. brand appearing in this affidavit belonged to Daniel Connolly.

Q. Where did you see these cattle. In what part of the country?

A. Thirty-six head of cattle were on the north

(Testimony of Eugene W. Barrett.)

half of section eleven, thirty-five, nine; the same being part of the allotment of Emma C. Blood, Blackfoot allottee number two thousand seven hundred and forty-two, and the south half of section eleven being part of the [176] allotment of Mollie Blood, allotment number two thousand seven hundred and forty-three.

Q. Going back and directing your attention to July 24, 1941, I will ask you where you were on that particular date, and who accompanied you?

A. On that date, July 24, about three thirty in the afternoon while in company with Charles Girard, the Junior Range Guard, we counted twenty-five head of horses bearing the brand P. Y. on the left jaw.

Q. Where did you count these horses?

A. They were on the allotted land embraced in sections twenty-one, twenty, in township thirty-five, range nine.

Cross Examination

By Mr. McCabe:

Q. Mr. Barrett, that is the name of it not?

A. That is right.

Q. I noted, or I noticed in your testimony that you are testifying from a memorandum, or some paper. Your testimony is based entirely upon these papers with respect to what you observed on these different dates, as a memorandum in writing?

A. These are affidavits.

Q. Are those the affidavits that you made yourself?

(Testimony of Eugene W. Barrett.)

A. Yes. Would you like to see them?

Q. No, I am merely trying to identify the papers. You say these affidavits were made at the time and filed with the Indian Department, or Indian Office?

A. Yes.

Q. At the time when you say the cattle and these horses [177] bearing the Connolly brand, did you see on the same allotment horses or cattle or sheep belonging to someone else, or other horses, cattle or sheep?

A. Are you talking about Mr. Brian Connolly, or both the Connollys?

Q. Both of them, other than their cattle and brands, Brian and Dan Connolly, both.

A. No, sir.

Q. So that at no time on these occasions that you were out there, did you see cattle or horses or sheep bearing any other brands than such as you have testified to?

A. Yes. I saw sheep on the Unit surrounding the Connolly Unit on several occasions, but they were rightfully there.

Q. I am talking about the land that you saw Connolly horses and cattle on, on those lands, were they not?

A. No, definitely not. You mean interspersed with other cattle?

Q. No, on the same allotted land, not removed from it, but on that same particular allotment as the Connolly horses and cattle were grazing?

A. No, sir.

(Testimony of Eugene W. Barrett.)

Q. You never saw any sheep or anything?

A. No, sir.

Q. Now, on these occasions on which you observed the cattle and horses bearing Connolly's brand, grazing on that particular tract of land, did you stop to observe how long they were there?

A. No, sir. [178]

Q. You didn't pay any attention to that?

A. No, we saw horses. Horses are easily identified by certain characteristics. You notice, after you are used to being in a certain area you will notice different bands of horses and cattle.

Q. So, after the first time you observed horses and cattle on that land, I understand you didn't pay any attention to what brands the horses bore on subsequent dates? A. No.

Q. No. That is all.

Witness excused.

Whereupon

DARRELL P. YOUNG,

a witness called and sworn on behalf of the Government, testified as follows:

Direct Examination

By Mr. Allan:

Q. Will you please state your name?

A. Darrell P. Young.

Q. What is your business or occupation?

A. Farm Agent.

(Testimony of Darrell P. Young.)

Q. Where are you located?

A. Blackfeet Indian Reservation.

Q. When you say "Farm Agent," just give us a definite detail of what your duties are?

A. My duties are to aid the Indian farmers and stock growers on the Reservation in the production of livestock and farm products, and other agricultural enterprises which they may undertake. [179]

Q. You are then employed by the Indian Service?

A. Yes.

Q. And what is your particular assignment at this time, what Reservation, I mean?

A. Blackfeet Indian Reservation.

Q. How long have you been assigned to the Blackfeet Indian Reservation?

A. Thirteen months in the capacity of Farm Agent.

Q. And prior to that time what did you do?

A. I was working for the Department of the Interior, Indian Service, as Junior Soil Surveyor.

Q. Were you on the Blackfeet Indian Reservation?

A. I was attached to the Blackfeet Indian Reservation from June 19, 1941, until December, 1941, at which time I went to Billings.

Q. Did you have occasion on August 13, 1941, to make an inspection in company with Eugene Barrett, of the Connolly horses on the Blackfeet Indian Reservation?

A. I did.

Q. What did you do. What did you determine Mr. Young, what did you see?

(Testimony of Darrell P. Young.)

A. On August 13, 1941, while in company with Mr. Barrett I counted thirty-two head of horses bearing a P. Y. brand on the left jaw on sections one, thirteen, township thirty-five north, range nine west.

Cross Examination

By Mr. McCabe:

Q. Did I understand you to say thirty-eight head or thirty-two head?

A. Thirty-two head. [180]

Q. And how long were you there at the time you made the examination of those horses?

A. Oh, approximately forty-five minutes to an hour.

Q. And were those horses all bunched there, or were they scattered throughout the sections?

A. We encountered the horses pretty well in a group, in a bunch you might say, in a band.

Q. Altogether, that is, did you each make separate counts? A. Yes.

Q. And after you counted them, did you compare your count with the other? A. Yes.

Q. And was there any variation at that time?

A. No variation. The horses were very easily identified, the brands on the jaw were very easily seen.

Q. And at that time did you see any other horses or cattle or livestock grazing on the same section eleven? A. No.

Q. Did you make any investigation to determine

(Testimony of Darrell P. Young.)

whether there were other horses grazing on that section?

A. No particular effort was made.

Q. What was that?

A. No particular effort was made to determine that.

Q. I understand that when you went to that section, and went out for the purpose of finding just as many Connolly horses on the land, on the section as you could, was that the purpose?

A. No, sir. [181]

Q. How does it come that you made an examination as to the Connolly horses, and did not make any examination as to the other livestock?

A. We counted the brands on the horses; in making the investigation we were not particularly making an investigation when we went there as to horses.

Q. But when you saw some horses with P. Y. brands on them, then you went ahead and examined all the horses with the P. Y. brand on the section?

A. Yes, that is right.

Q. But you had no particular purpose in doing that, had you. That is correct?

A. Yes, we had a purpose.

Q. What was that purpose?

A. Determining the livestock that were on the land, and the use that was made of the land, and the condition of the land, and at the time I might say that the Connolly horses had been encountered so many times in this section, that we took it upon ourselves to count those horses at that time.

(Testimony of Darrell P. Young.)

Q. You say the Connolly horses had been on there so many times. Did you see them there?

A. Yes, I saw them on there.

Q. You say you saw these horses on that area prior, or at prior times other than on August 13, 1941?

A. Yes.

Q. So that, the purpose of your visit out there on August 13, 1941, was to find out if any of the Connolly horses were on that land?

A. No, sir. [182]

Q. I just thought you said the reason you examined the Connolly horses was because they had been on there so much before, you wanted to find out about the horses?

The Court: No, he said he seen them so many times that this time he counted them. That is what I understand he intended to say.

Q. How many times before this had you seen the Connolly horses on that particular tract of land?

A. I don't recollect any specific number of times.

Q. By number of times, would you say two or three times?

A. I don't know how many times we might have encountered them on that particular land.

Redirect Examination

By Mr. Allan:

Q. Your work around this land on which you encountered the Connolly horses, was for the soil conservation at that time?

A. Yes, sir.

Q. Just because of the fact that you saw these

(Testimony of Darrell P. Young.)

horses there so often, you counted the horses on that particular occasion? A. Yes, sir.

Q. But your primary purpose was to determine the character of the soil, range conditions, and matters of that kind? A. Yes, sir. [183]

Recross Examination

By Mr. McCabe:

Q. Do you know where the Connolly Unit is on that area, Unit twelve?

A. At this time now, or at that time?

Q. At that time?

A. No, I didn't know the specific boundaries at the time.

Q. How did you identify these particular head of horses were upon section eleven, thirty-five range nine west. Did you go and look at the allotment pins?

A. That is right. We were making a survey. We kept track every quarter of a mile for our exact location, if it was possible to do so by allotment pins. We kept track every quarter to half mile where we encountered an allotment pin. We recorded them on that.

The Court: Q. You said you knew where the Blood allotments were? A. Yes, sir.

The Court: Q. How much did you cover, did you ride over them?

A. Yes, we rode over them on numerous occasions.

The Court: Q. On the numerous occasions that

(Testimony of Darrell P. Young.)

you were being questioned about, did you ride over the entire allotments? A. Yes, sir.

The Court: Q. Now, you have testified about those brands. Did you see other brands there around the Blood allotment at that time? [184]

A. No, sir, there was only one band of horses.

The Court: Q. Just one band of horses?

A. Yes, sir.

Whereupon a recess was had until two o'clock P. M.

Afternoon Session May 6, 1943.

Two o'clock

Mr. Allan: May it please the Court, I would like to recall Mr. Stephenson.

The Court: Very well.

Whereupon

ALBBERT E. STEPHENSON

was recalled as a witness on behalf of the Government, and testified as follows:

Direct Examination

By Mr. Allan:

Q. When I asked you this morning in the examination what the annual grazing costs for one horse during the year 1940 was on the Blackfeet Indian

(Testimony of Albert E. Stephenson.)

Reservation, I believe you said the annual figure was four dollars and fifty cents? A. Yes, sir.

Q. Was that correct?

A. The correct figure was five dollars and forty cents.

Q. Five dollars and forty cents is the correct figure? A. Yes.

Q. Now, on various occasions have you had occasion to check the Connolly Unit number twelve, the number of livestock grazing thereon?

A. Yes.

Q. And as you fixed it on January 27th, and January 28th, did you check that Unit for livestock grazing [185] thereon? A. Yes.

Q. How many livestock did you see on the Unit at that time?

A. No less than twenty-five head.

Q. That is the year 1942? A. Yes.

Q. Then again on January the 6th, 1942, did you check the Unit? A. January 16th.

Q. 1942. Did you check the Unit on that day?

A. Yes.

Q. How many livestock did you see on the Unit at that time grazing?

A. I didn't observe any of the cattle on the Unit at that time.

Q. Were there any horses on the Unit at that time? A. Yes.

Q. And approximately how many would you say? A. Approximately twenty-five head.

(Testimony of Albert E. Stephenson.)

Q. Then, referring to the year, 1941, in the month of October, upon the 21st of October, did you check the Unit for the number of cattle grazing thereon?

A. Yes, not less than thirty head at that time.

Q. Were those horses or cattle?

A. Cattle.

Q. Do you recall seeing any horses?

A. I don't recall seeing any horses at that time.

Q. According to your regulations in your Department, when a man removes livestock from one Unit to another [186] is a crossing permit issued?

A. Yes, it is supposed to be required.

Q. Was any crossing permit issued to Mr. Connolly to move cattle from one Unit to another?

A. No.

Q. This morning you testified that Mr. Connolly had Unit twelve? A. Yes.

Q. Approximately how many acres did that include?

A. Approximately twenty thousand acres in——

The Court: About five thousand acres in Unit twelve.

A. Approximately five thousand seven hundred acres.

Q. I believe you stated that he had other Units there, and there is one designated as one hundred and eighty-five? A. Yes, sir.

Q. About how many acres in that Unit?

A. You have the files there, Mr. Allan, three hundred and sixty.

(Testimony of Albert E. Stephenson.)

Q. I believe you testified as to deeded land that he had? A. Yes, sir.

Q. Is that a part of Unit one hundred and eighty-five at this time?

A. At the time that the action was filed it was not. It was adjacent to Unit number one hundred and eighty-five.

Q. At the present time it is part of the Unit one hundred and eighty-five? [187] A. Yes.

Q. And how many acres does it contain?

A. Approximately fourteen hundred and forty acres.

Q. And I believe, you also testified about having an interest in some other lands up there, that was designated as farm grazing lease? A. Yes.

Q. How many acres does that Unit contain, and what is the number?

A. One lease identified as F. G. three thirty-seven comprised of seven hundred and forty acres.

Q. At the time that this action was commenced, on November 22, 1941, did Mr. Connolly or his son have any other lands on the Blackfeet Indian Reservation to which they were entitled to the use and occupancy?

A. No, no other land at that time.

Q. Since the commencement of this action, I believe they have acquired additional land?

A. Yes.

Q. What was the date that they acquired these additional lands?

(Testimony of Albert E. Stephenson.)

A. Unit number one hundred and eighty-five S, comprising eight hundred and five acres at the effective date of May, 1942.

Q. Was there another farm grazing lease acquired at that same time? A. Yes.

Q. What is its designation, please?

A. F. G. 445.

Q. How many acres of land does this consist of?

[188]

A. Two hundred and forty acres of the effective date May 1, 1942.

Q. Were any crossing permits issued by your office for the Swanson cattle to Connolly's Unit?

A. None.

Q. Was there any crossing permit issued by your office to place cattle on Mr. Connolly's Unit?

A. None.

Cross Examination

By Mr. McCabe:

Q. Mr. Stephenson, with reference to these crossing permits, those crossing permits, what is the procedure in respect to handling them, and getting permission to cross?

A. The permission is asked for, and if everything is in order, why, the crossing permit is issued covering the period of time the crossing is to be made, route to be followed, and so forth.

Q. Do I understand that under your regulations, where Mr. Connolly, an Indian up there, is moving cattle from one Unit on which he has grazing rights to another Unit, or home ranch, or whatever it is,

(Testimony of Albert E. Stephenson.)

that he has to obtain on each occasion a crossing permit for every head moved?

A. That is right.

Q. And that he is not permitted to move any stock without such crossing permit?

A. That is right.

Q. Isn't it true that the so-called regulations of your office, have not been observed during the past [189] number of years; that you have permitted them to take their cattle across without any crossing permit?

A. They have been requiring it for some time now.

Q. For how long have they been requiring it?

A. For the last three or four years.

Q. In 1941 did you require that in all cases?

A. It is required, yes.

Q. And there was no exception to that at all?

A. There were some, the same as Mr. Connolly, that did not observe it, but it was required as a part of the contract itself that those crossing permits be obtained.

Q. And when a person came and had moved cattle and reported the fact that they had moved their cattle from one place to another allotment orally to your office, you didn't require a written permit to be issued, did you?

A. If the cattle were already moved, why, I would take it as a matter of record.

Q. And you approved it? A. Yes.

(Testimony of Albert E. Stephenson.)

Q. Now, you were talking about a water well in section ten, township thirty-four north, range nine west, this morning where, I believe you stated you saw nine head or thereabouts of Mr. Connolly's cattle around this well. Do you recall that testimony? A. Yes.

Q. Is that the well where the windmill is?

A. Yes.

Q. And isn't it a fact the windmill has been shut off [190] so that it would not bring water to the surface on that tract?

A. Shut off at the present time, yes.

Q. And wasn't it shut off at the time you were up there or did you examine it?

A. I didn't examine it at the time.

Q. Now, this morning you also testified that there was no such a provision or understanding with your office, in connection with grazing and farming leases whereby a person was entitled to increase the number of their livestock grazed proportionately, as they decreased the number of months they grazed the tract?

A. My testimony was in regard to Unit twelve, covered by a grazing permit.

Q. Covered by what?

A. My testimony was in regard to Unit twelve covered by the grazing permit.

Q. But in other permits it was the understanding and it was the practice of the office, that where a permit or a lease was issued for grazing for a period of months, stated period of months, for a

(Testimony of Albert E. Stephenson.)

stated number of livestock, that the permittee or lessee was privileged to increase his number of livestock proportionately as he decreased the number of months that he did not graze that particular land?

A. You would have to segregate permits and leases in that respect.

Q. Then as to leases there is such a practice in the office, is there not?

A. There is a provision in the lease, yes, sir.

[191]

Q. What was the total number of acres that you determined Mr. Connolly had grazing rights upon on the Blackfeet Reservation in 1941?

A. I didn't total them.

Q. You didn't total them?

A. No, I have not.

Q. Did you total the number of acres that he was entitled to graze upon in 1942?

A. No, I did not.

Q. And is that true of 1943?

A. 1943, I have totals on those.

Q. How much?

A. For the grazing season of 1943, I don't have the totals on those, the contracts are not completed for 1943, and I have not brought the totals up yet.

Q. I don't know that I understand you.

A. There are being new contracts issued for the year 1943. The contracts are not completed as yet, and I have not totaled those up.

(Testimony of Albert E. Stephenson.)

Q. So you have not totaled those up for 1943 either?

A. That is right.

Redirect Examination

By Mr. Allan:

Q. I think what Mr. McCabe had reference to, Mr. Stephenson, was the on and off privileges that are considered by the Indian Department with reference to grazing on the Blackfeet Indian Reservation.

A. We have those permits there.

Q. Did the lease provide for the on and off privileges?

A. Yes, sir. [192]

Q. Will you just explain how those on and off privileges work?

A. In a given area they have certain lands under which the contract payment is made to the office, and on other areas, other lands in the area the individual may own deeded land or allotted land, in order to regulate and establish the carrying capacity the entire area, the permit proper is issued for the land covered by the contract, and the payments made to the office for that, and on the other plan the carrying capacity is provided for in what we term on and off clause of the contract, so that we have in the contract the total number of stock to be grazed on the Unit, on both classes of land.

Q. Now, did Mr. Connolly take his cattle off of the Unit so as to entitle him to that on and off privilege?

A. Well, Unit twelve is not tied into the deeded land down on Willow Creek, where he takes his cattle in the fall of the year. The on and off clause

(Testimony of Albert E. Stephenson.)

covers only part within the bounds of Unit twelve.

Q. And he would have to take the cattle off of that to be entitled to have that privilege?

A. That is right.

Q. Did he do so?

A. He took his cattle down there in the winter of 1941 and 1942.

Q. And what would that entitled him to run in, in addition to Unit twelve?

A. Without crossing permit to know when the stock was taken to Unit twelve and also a crossing permit to [193] know when they were moved from the Unit to deeded land, we cannot determine what stock he should have because we don't know what period of time that the cattle were supposed to be on Unit twelve. That would be the controlling factor, is the length of time the stock was on the Unit. Without that information we could not allow for more than those cattle called for under the contract, because we don't know the difference in the period of time.

Q. Then, as I understand this on and off clause, or privilege, it is a matter of bookkeeping to work out the different Unit owners who have privileges?

A. That is right.

Q. And you had no information that would enable you to fix or adjust the proportion of this on and off privilege?

A. That is right.

Government rests.

DEFENDANTS CASE

Whereupon

BRIAN CONNOLLY,

a witness called and sworn on behalf of the defendants, testified as follows:

Direct Examination

By Mr. McCabe:

Q. Now, what is your name?

A. Brian Connolly.

Q. Where do you reside?

A. Well, my post office address is Blackfoot, I don't [194] reside there though.

Q. Mr. Connolly, have you any children?

A. Yes, sir.

Q. How many children have you. Just state their names and ages?

A. There is nine of them, but as far as the ages are concerned, I would have to look that up.

Q. Approximately, just the approximate ages?

A. The oldest one is Merle Connolly Shukap. She is married.

Q. I am referring to your unmarried son?

A. Well, this girl wasn't there anyway at the time.

Q. Well, tell us and the Court, the names of your unmarried sons and their approximate age?

A. That was there at the time?

Q. Yes?

A. Well, there is Dan Connolly.

The Court: His age?

(Testimony of Brian Connolly.)

A. I was just trying to figure it out. I think he was born in 1917; he would be about twenty-five, I imagine, and Eddie Connolly is next.

Q. How old is Eddie?

A. He was eighteen the 30th day of April.

Q. And how old is Victor?

A. There is Charlie that is next.

Q. All right, how old is Charlie?

A. He is about sixteen.

Q. And how old is Victor?

A. Victor is about thirteen.

Q. Going on fourteen? [195] A. Yes, sir.

Q. In the year 1941, how many head of cattle did you own?

A. Well, we left one kid out there yet.

Q. That is the younger boy? A. Yes.

Q. I don't care about it. Let us have it, what is the youngest boy's name?

A. His name is Martin.

Q. How old is he?

A. He is about eight years old.

Q. Now, during the year of 1941 how many head of cattle did you have of your own?

A. Well, I think it was around one hundred and thirty head, more or less.

Q. And how many head of cattle did Dan own, if you know?

A. Well, I don't think he had over one with his own brand on.

Q. How?

A. He didn't have over one, one cow.

(Testimony of Brian Connolly.)

Q. How many head of horses did you own in 1941?

A. Well, we didn't count them, but I don't think there was over one hundred head. I would rather think there was less.

Q. Would you say seventy-five head?

A. We would say there was at least seventy-five head.

Q. Did that include Daniel's horses?

A. Yes.

Q. That means the whole bunch owned by you and Dan? [196]

A. Yes, all of them.

Q. Now, are you familiar with the land which has been referred to in these proceedings here, range Unit number twelve, for which a permit was issued to you and Fred Choquette?

A. It is Frank Choquette.

Q. Are you acquainted with the location of that land?

A. Yes sir.

Q. Besides that land included in Unit twelve, have you any other land up there in that area?

A. Why, yes.

Q. And how many acres of land do you have in that area that you graze stock on, other than that embraced in Unit twelve. That is in 1941?

A. There was two hundred and eighty acres in thirty-five, eight, that ain't mentioned in any suit.

Q. Township thirty-five north, range eight west?

A. No, the section number.

Q. Then, did you have approximately a lease

(Testimony of Brian Connolly.)

on twelve hundred acres of land,—a lease on twelve hundred acres of deeded land from Kipp?

A. Not in twelve.

Q. No, beside what was in twelve?

A. There is twelve hundred acres of the children's land in number twelve.

Q. All in Unit number twelve is covered in this exhibit one, is it not, and by that you refer to the land owned by Daniel Connolly?

A. Yes, Merle Connolly, Nora Connolly.

A. So that altogether in Unit twelve you have as shown [197] by this exhibit, fifty-seven hundred sixty acres?

A. Yes, there is more land besides that.

Q. I mean in this Unit twelve. Is there more land besides that in Unit twelve?

A. Yes, there is, that you have not mentioned in there at all.

Q. How many acres is that?

A. I believe that you have got the list of all of it there.

Q. In 1i41 is this?

A. Yes sir. There is some of the leases that were drawn on the check; that was not mentioned on the lease, but paid by the check.

Q. You mean you paid for some land in Unit twelve by check? A. Yes, no lease on it.

Q. Who did you pay that to?

A. It is on the checks there.

Q. Do you remember who it was to?

A. It was to Clara Hanson.

(Testimony of Brian Connolly.)

Q. How many acres did you get from that?

A. Two hundred and eighty.

Q. You must have that check. We will go along and get that later on. Now, besides these five thousand seven hundred and sixty acres, as shown in this exhibit one, which is the Choquette and your permit, did you have an instrument purporting to lease such land or some land of Isabelle Kipp and Dora Kipp and Joseph Kipp? A. Yes sir.

Q. Showing you defendants exhibit three, state whether [198] you know whose signatures those are appearing on that lease of Joseph Kipp?

Mr. Allan: May I just ask a question or two about this?

The Court: Yes.

Mr. Allan: Q. Is this Indian land on the Reservation?

A. Yes sir.

Q. Was the lease approved by the Superintendent of the Reservation and recorded with the Superintendent? A. No, with his consent.

Q. Is it approved by him?

A. Approved by Wershing.

Q. Wershing was not Superintendent of the Reservation?

A. That don't matter. He gave us his consent.

Q. Is there anything on here to show the approval of the Superintendent?

A. No, we went and showed the Superintendent the rules and regulations where these fellows can

(Testimony of Brian Connolly.)

lease their own land, and they approved it under those conditions.

Mr. Allan: We object to this for the reason that it is not approved by the Superintendent.

Mr. McCabe: We have a letter.

The Court: The regulations require the approval of the Superintendent?

Mr. Allan: Yes.

Mr. McCabe: Q. Wasn't this patented land?

A. No sir.

Q. Was this patent in fee land?

A. No sir. [199]

Mr. McCabe: When this lease was executed, this defendants exhibit three, did you take the matter up with the Superintendent at the Agency?

A. I did.

Q. And did he say it was all right to go ahead and accept the lease? A. He did.

Mr. Allan: The best evidence would be the approval of the Superintendent on that lease because of the specific rules and regulations under which the Superintendent must act. There is nothing to show that it was approved by the Superintendent.

Mr. McCabe: The question in this case is a willful trespass upon certain lands, and we are going to show that we had the right to graze stock on a certain acreage, certain number of acres, and if in the course of grazing that stock, any of them strayed, and caught and turned back to the range, that belonged to us, would not constitute a trespass

(Testimony of Brian Connolly.)

upon Indian land or upon the land complained of. That is the purpose of this offer.

The Court: That question, willful or malicious trespass, if that is the language of the complaint, it was not such a lease as the regulations required. He talked to the Superintendent about that; he got the oral consent from the Superintendent to accept the lease from this person. It is not a valid lease under the regulations, nevertheless, it might go to that question of willful and deliberate trespass. I think that perhaps I will allow you to go into it [200] on that score for the time being anyway.

Q. And did Joseph Kipp whose name appears on there, sign that lease. Is that his signature appearing thereon? A. Yes sir.

Mr. McCabe: We now offer in evidence defendants proposed exhibit number three.

The Court: Is there anything on it anywhere to indicate the approval of anybody officially connected with the Reservation?

Mr. McCabe: Not endorsed on it, merely the oral statement of the witness; it was executed with the authorization of the Agent.

The Court: We will let it in subject to the objection.

Mr. Allan: We object to the proposed exhibit three in that the lease covers Indian land on the Blackfeet Indian Reservation, allotted land under the administration of the Indian Department, and there is absolutely nothing on the lease to show that it was ever approved by the Superintendent, or

(Testimony of Brian Connolly.)

any authorized Government Agency. Furthermore, the lease is not recorded with the Superintendent of the Agency as required to be.

The Court: Well, under those circumstances I doubt whether it should be considered. I will not pass on it at this moment. I will receive it subject to the objection of the United States Attorney. I may not consider it later on.

Whereupon defendants exhibit number three was [201] received in evidence, and is in words and figures as follows, to-wit:

DEFENDANTS EXHIBIT No. 3

This Agreement, made and entered into this 19th day of Feby. A. D. 1941, by and between Joseph Kipp #2 party of the first part, and Brian Connolly party of the second part, Witnesseth, that the said party of the first part for and in consideration of the rents and covenants hereinafter mentioned and to be paid and performed by the said party of the second part, has Demised, Leased and Let, and by these presents does Demise, Lease and Let unto the said party of the second part, the following described. . . .

NW and NE and SW of Sec 20, and the SW of NW Sec. 21 and NW and N $\frac{1}{2}$ SW Sec. 29 and NW of SE Sec 30 and NE Sec. 28 and W $\frac{1}{2}$ W $\frac{1}{2}$ Sec. 27 Township 34 N. Range 9 West, comprising 1120 acres of the allotments of Isabell Kipp, Elizabeth Kipp, Dora Kipp and Joseph Kipp #2.

(Testimony of Brian Connolly.)

To Have and to Hold, the above rented lands to the said party of the second part his heirs, executors, administrators and assigns for and during the full term of one year from and after the first day of May, 1941, for grazing privileges, with haying privilege reserved to the owners.

And the said party of the second part, for him his heirs, executors, administrators, and assigns agree to and with the said party of the first part, to pay his heirs, executors, administrators and assigns, as rent for the above mentioned grazing privileges, the sum of one [202] hundred sixty-eight Dollars, per year, half payment to be made in advance on signing the lease. The receipt of which payment is hereby acknowledged. \$84.00 paid on signing—\$84.00 to be paid Nov. 1, 1941, for and during the term of this lease.

And It Is Further Agreed, by and between the parties as follows: That should the said party of the second part, his heirs, executors, administrators or assigns, fail to make the above mentioned payments as herein specified or fail to fulfill any of the covenants herein contained, then and in that case it shall be lawful for the said party of the first part, his heirs, executors, administrators or assigns, to re-enter and take full and absolute possession of the above rented lands and hold and enjoy the same fully and absolutely, without such re-entering working a forfeiture of the rents to be paid and the covenants to be performed by the said party of the

(Testimony of Brian Connolly.)

second part, his heirs, executors, administrators or assigns, for the full term of this lease.

And the said party of the second part also covenants and agrees to and with the said party of the first part, not to sublet the above rented lands or any part thereof during the full term of this Lease, without first obtaining the consent of the said party of the first part, his heirs, executors, administrators or assigns, thereto, and that he will at the expiration of the time as herein recited, quietly yield and surrender the aforesaid rented lands to the said party of the first part, his heirs, executors, administrators or assigns, in as good condition and repair as when he took them, reasonable wear and tear [203] damages by the elements alone excepted.

In Testimony Whereof, both parties have hereunto set their hands and seals this 19th day of February, A. D. 1941,

[Seal] JOSEPH KIPP #2

[Seal] BRIAN CONNOLLY

State of Montana,
County of Glacier—ss.

On this 19th day of February in the year A. D. One Thousand Nine Hundred Forty-one, before me J. L. Sherburne, a Notary Public for the State of Montana, personally appeared Joseph Kipp #2 and Brian Connolly known to me (Or proved to me on oath of) to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they each of them respectively, executed the same.

(Testimony of Brian Connolly.)

In Witness Whereof, I have hereunto set my hand and affixed my Notarial Seal, the day and year first above written.

[Seal] J. L. SHERBURNE

Notary Public for the State of Montana Residing
at Browning

My Commission expires Nov. 15, 1943.

Q. Now, in 1941, in the year 1941, did you receive from the Indian Department a farming and grazing lease purporting to grant you rights to lands belonging to Willie Marie Kipp, deceased, and Alfreda Kipp? A. Yes, sir.

Q. Showing you the defendants proposed exhibit number four, state whether that is your signature appearing thereon? [204]

A. Yes, you bet.

Q. And is that the signature of Alfreda Kipp?

A. I don't know. They had to send it to her. I was not there.

Q. Was this lease handled by the Indian Department at Browning? A. Yes.

Q. And showing you the signature of James W. Cross, do you know whose signature that is?

A. Yes, that is Cross' signature.

Q. Is that the Clerk at Browning, at the Indian office? A. Yes.

Q. Down at the bottom, or endorsed on this you will note the endorsement, "Recommended for ap-

(Testimony of Brian Connolly.)

proval by D. A. Longenbaugh, Agricultural Extension Agent," do you observe that signature?

A. Yes, sir.

Q. And then this signature appearing thereon, F. H. McBride. Do you know whose signature that is?

A. That is the Superintendent of the Blackfeet Indian Reservation.

Mr. McCabe: We will now offer in evidence defendants exhibit number four.

Mr. Allan: This is the lease that Mr. Stephenson testified to as being in effect May, 1942. We have no objections.

The Court: It may be received in evidence.

Whereupon defendants exhibit number four was received in evidence and is in words and figures as follows, to-wit: [205]

DEFENDANTS EXHIBIT No. 4

5-180b

(April 1929)

United States

Department of the Interior

Office of Indian Affairs

Cont-1-5-Ind-8828

Write all names in full and be sure to give correct and full post office addresses.

Farming and Grazing Lease

Lease No. FG-445 Tribe Blackfeet. Allotment No. 3019.

This Contract, in quadruplicate, made and en-

(Testimony of Brian Connolly.)

Defendants' Exhibit No. 4—(Continued)

tered into this 24th day of June, 1942, by and between the Indian or Indians named below (the Superintendent of the Indian Agency acting for and on behalf of minors, undetermined heirs, non-competents, and nonresidents), hereinafter called the "lessor,"

Aect. No.

| Lessors | Year | Sex | Share | T. B. | Page | Amount |
|---------|------|-----|-------|-------|------|--------|
| Born | | | | | | |

~~K-22~~ Willie Marie Kipp, dec.,

K-48 Alfreda Kipp All\$41.00

Total,

and Brian Connolly of Browning, State of Montana, Rural Route No. , , , , hereinafter called the "lessee," under and in accordance with the provisions of existing law and the regulations prescribed by the Secretary of the Interior relative to Farming and Grazing leases on restricted Indian lands, Witnesseth: That for and in consideration of the rents, covenants, and agreements hereinafter provided for, the lessor doth hereby let and least unto the lessee the land and premises described as follows, to-wit: E/2 SE/4 Sec. 28 and the SE/4 of Sec. 20, Twp. 34, R. 9 West, containing 240 acres, more or less, for the term of [206] one years, beginning on the first day of May 1, 1942, fully to be completed and ended on the 30th day of April, 1943, subject to the conditions hereinafter set forth. The lessee, in consideration of the foregoing, covenants and agrees to pay the officer in charge of the Indian

(Testimony of Brian Connolly.)

Defendants' Exhibit No. 4—(Continued)

agency \$41.00 per annum for the use and benefit of the lessor, as rental for the land and premises, said sum to be paid in semiannual payments as stated below.

| Date due | Amount | Improvements |
|----------|--------|--------------|
|----------|--------|--------------|

| | | |
|------------------------|---------|--|
| Upon approval of lease | \$41.00 | |
|------------------------|---------|--|

The lessee agrees to pay 15c an acre to graze the land and also agrees to pay an additional sum of \$5.00 for the hay stumpage. The lessee hereby agrees that he will not stock the above lands in excess of 24 acres for each cow and horse and 6 acres for each sheep or the equivalent thereof where the grazing season is less than twelve months.

1. Interest. It is understood and agreed by and between the parties hereto that if any installment of rental is not paid within thirty days after becoming due that interest at the rate of 6 per cent per annum will become due and payable from date rental became due and will run until said rental is paid.

2. Improvements to Be Placed,—It is expressly understood and agreed by and between the parties hereto, that the lessee will, at his own expense, within from the beginning of this lease, build, construct, and erect the following improvements upon the above described land:

.....
all of which are to be constructed in a substantial and [207] workmanlike manner and of durable material within the time limit specified above, or he

(Testimony of Brian Connolly.)

Defendants' Exhibit No. 4—(Continued)
shall be liable for the full value thereof, with a fifteen per cent penalty additional for improvements not made as above set forth.

3. Improvements Which May Be Removed.—It is further agreed by and between the parties hereto, that the lessee may place the following improvements on the land covered by this lease and remove same within thirty days after the termination of his occupancy; Provided, that he may not attach such improvements to any improvements already on the land or to permanent improvements to be hereafter constructed, in such a way that the removal thereof would in any way damage the improvements which must be left on the land.

4. Improvements Which May Not Be Removed.—It is further understood and agreed by and between the parties hereto that any and all improvements placed upon the leased premises not stipulated in this lease contract are to remain thereon at the expiration of the lease term and become the property of the lessor.

5. Insurance.—It is further understood and agreed by and between the parties hereto that the lessee is * * * to insure buildings now on the leased premises or hereafter placed thereon, which are in physical condition to insure, against loss by fire, lightning, windstrom and tornadoes in the full insurance value thereof, for the use and benefit of the lessor, in a company acceptable to the officer in

(Testimony of Brian Connolly.)

Defendants' Exhibit No. 4—(Continued)

charge of the Agency, and will keep such insurance in force during the full term of this lease; the insurance money, in the event of loss, to be paid to [208] the said officer in charge, for the use and benefit of the lessor; provided, however, that the lessee may rebuild the improvements within ninety days after the loss to the satisfaction and acceptance of said officer in charge, and in such case receive the insurance money in reimbursement the expense incurred. The option of the less so to rebuild must be declared to said officer in charge within thirty days after the date of the loss; in the event that the lessee does not exercise the option hereunder, it is agreed that said improvements may be rebuilt therewith in the discretion of the said officer in charge. In event the buildings are in physical condition to insure but on account of their not being occupied no insurance company will write a policy, it is understood and agreed by and between the parties hereto that the lessee is to be responsible to the said officer in charge for the full value thereof, and that in event of loss he will pay to the said officer in charge the full amount of the damages, for the use and benefit of the lessor; provided, that said lessee may rebuild or repair the destroyed or damaged buildings under the same conditions as hereinbefore provided for destroyed or damaged buildings which had been insured. It is further understood and agreed by and between the parties hereto, that the lessee must within fif-

(Testimony of Brian Connolly.)

Defendants' Exhibit No. 4—(Continued)

teen days after the beginning of this lease file with the officer in charge of the Agency, a proper insurance policy or a statement by some reputable insurance agent that the buildings are not in physical condition to insure; and it is further understood and agreed by and between the parties hereto that the failure of the lessee to file [209] said policy or statement will forever bar him from claiming that the buildings are not in physical condition to insure and will render him liable to the said officer in charge, for the use and benefit of the lessor, for the full amount of any loss, of or to said buildings. It is further understood by and between the parties hereto that in the event of the loss or damage of any buildings which have not been insured and for which the lessee has not filed the above indicated statement that said buildings were not in physical condition to insure, that the officer in charge of the Indian Agency is to appraise the amount of the loss and his appraisal is to be accepted as the true amount of the damage which the lessee is to pay. Where the word "not" is inserted in the first line of this paragraph this clause does not apply.

6. Repairs.—It is understood and agreed by and between the parties hereto that the lessee is to keep the premises covered by this lease in good repair and the said lessee will be responsible for all damages done to buildings and fences and other improvements, except the usual wear and decay.

(Testimony of Brian Connolly.)

Defendants' Exhibit No. 4—(Continued)

7. Manner of Cultivation, Noxious Weeds, Johnson Grass, Etc.—It is understood and agreed by and between the parties hereto that the lessee is to cultivate, improve, and farm the lands covered by this lease in a husbandlike manner to the best advantage; that he is to commit no waste thereon; that he is to keep said lands free from noxious weeds; and that he is to keep down all Johnson grass that may appear on the leased premises during the term of this lease and to use diligence in an effort to [210] destroy same.

8. Crop Leases.—It is understood and agreed by and between the parties hereto that the lessee will not purchase or be a party to the purchase by anyone, of the lessor's share of the crop, prior to its delivery as hereinbefore provided, and that should he purchase the crops after that time, he will pay the regular commercial price in effect on date of such purchase; that the lessor will not mortgage or otherwise encumber or dispose of his share of the crop prior to its delivery by the lessee as hereinbefore provided for; and that the lessee will harvest crops as soon as possible after maturity in order that the lessor may pasture the land or sow it to wheat. It is further understood and agreed by and between the parties hereto that a strictly crop lease gives the lessee no rights whatsoever in or to any land not cultivated; in or to any pasture on the land; building on the premises; unless specifically stated.

(Testimony of Brian Connolly.)

Defendants' Exhibit No. 4—(Continued)

It is further agreed and understood that the shares in a crop rental shall be as follows: One-fourth of cotton when hand picked, one-third for snapped picked cotton, and two-fifths for sledded cotton, for the lessor's share. All cotton to be delivered at the gin, and money representing the lessor's part to be paid to the disbursing officer. If the lessor, or lessors, fail to receive the lessor's part of grain at the threshing machine, the lessee may market such grain and have a fair allowance for hauling such grain from the machine to market, all weights and bills to be presented to the farmer or agency officer for final settlement. This [211] division of crops and the handling of same shall govern unless otherwise specified in paragraph No. 2.

9. Stalk Fields.—It is understood and agreed by and between the parties hereto, that stalk fields upon the leased premises shall not be sold unless the same will be consumed without injury to the land and prior to the expiration of this lease; and that no cattle or other stock are to be placed upon the stalk fields in wet weather and that the lessee and his sureties shall be liable to the United States, for the use and benefit of the lessor, for any and all damages resulting to the land in violation of this provision of the lease contract. (This paragraph does not apply to ordinary crop leases as, under paragraph 7 above, the lessee has no rights to such stalk fields.)

(Testimony of Brian Connolly.)

Defendants' Exhibit No. 4—(Continued)

10. Overpasturing—Stock Laws — Fertilizers.—It is understood and agreed by and between the parties hereto that the lessee will not pasture on the leased premises an unreasonable number of animals for the grass and pasture afforded; that he will observe all quarantine and other stock laws and regulations now in force or hereafter promulgated by the United States or the State authorities; and that all manure and other fertilizer which may be produced upon the leased premises shall be the property of the lessor and shall be distributed upon the leased lands.

10A. Terracing.—It is understood and agreed by and between the parties hereto that the lessee will terrace and keep up the terrace on.....acres of land covered by this lease at the estimated cost of \$.....; and it [212] is further understood and agreed that the lessee shall do the terracing in accordance with the methods used by the State Agricultural College of the State in which the land covered by this lease is located. In Oklahoma Revised Circular No. 218, Series 56, 1928, the subsequent instructions issued by the Cooperative Extension Work in the Oklahoma Agricultural and Mechanical College, located at Stillwater, Okla., shall be followed.

11. Subleasing—Illegal Assignments—Transfers.—It is understood and agreed by and between the parties hereto, that any sublease, assignment, or

(Testimony of Brian Connolly.)

Defendants' Exhibit No. 4—(Continued)

transfer of this lease or of any interest therein can lawfully be made only with the consent of the lessor in writing and the approval of the representative of the U. S. Government by whom this lease is approved, or his successor in office, and that any assignment, sublease or transfer made or attempted without such consent and approval shall be void and render this contract subject to cancellation by such officer. It is further understood and agreed by and between the parties hereto that the lessee hereto will be guilty of unlawful subleasing if he contracts, without the consent of the lessor, and the approval of the officer in charge of the Indian agency, in writing, with any other person or persons to farm or use the premises or any part thereof, on any other basis than the payment by said lessee of so much money per hour, per day, per week, per month, or per job. It is further understood and agreed by and between the parties hereto that all share cropping or releasing for cash, all or any part of the premises, by the lessee herein, without the consent in writing of the lessor and [213] the written approval of the officer in charge of the Indian agency, except as provided in paragraph numbered 8, hereinbefore, is unlawful subleasing and renders this lease subject to cancellation by said officer in charge of the Indian agency.

12. Timber.—It is understood and agreed by and between the parties hereto that the lessee herein may utilize as fire wood, for his own use only, such

(Testimony of Brian Connolly.)

Defendants' Exhibit No. 4—(Continued)

dead and down timber as there may be on the leased premises which is not required by the lessor for his own, individual use; that no green timber may be cut by either the lessor or lessee without written consent of the officer in charge of the Indian agency, except, that the lessee may cut posts for repairing fences on the leased premises only. (See paragraph 13 prohibiting the lessee cutting posts where a cash allowance is made in the lease contract).

13. Posts.—Where a cash consideration is allowed for posts, it is understood and agreed by and between the parties hereto that metal, yellow pine, bois d'arc, post oak, or white oak posts are to be furnished unless otherwise stipulated in paragraph No. 2. The kind of posts to be furnished is to be stated in the blank space in paragraph No. 2 and if it be either of the five kinds named in this paragraph, the specifications are to be as follows: Metal posts must be steel line posts, 6 feet in height, weight not less than $8\frac{1}{2}$ pounds finished with a heavy coat of special steel paint, to be set in the ground two feet and no more than 20 feet apart, corner and gate posts well braced, must be not less than $7\frac{1}{2}$ feet in length, weight not less than 20 pounds, gauge [214] No. 8, and must be set in the ground $3\frac{1}{2}$ feet. Bois de' arc No. 1 select, white oak No. 1 select, post oak No. 1 select or Southern Yellow pine to be 6 to $6\frac{1}{2}$ feet in length and 4 to 5 inches in diameter at the top, placed not less than 2 feet in the ground, set in a

(Testimony of Brian Connolly.)

Defendants' Exhibit No. 4—(Continued)
true line, well tamped, not farther than 20 feet apart, corner and gate posts are to be 8 feet in length, not less than 8 inches in diameter at the top, placed $3\frac{1}{2}$ feet in the ground, fence to be well braced at the corners and gates. The Southern Yellow Pine posts must be pressure treated with No. 1 grade English cresote oil. (Where a money consideration is allowed, and where other than either of the five kinds of posts named in this paragraph are agreed upon, such posts must be stipulated in writing in paragraph No. 2 with special specifications required to fulfill the contract.)

14. Nuts and Fruits.—It is understood and agreed by and between the parties hereto that the lessor reserves all uncultivated nuts such as pecans, walnuts, etc., berries and other wild fruits, except a reasonable amount for the personal use of the lessee and his immediate family unless otherwise provided in the lease.

15. Prairie Dogs.—It is understood and agreed by and between the parties hereto that the lessee herein must kill all prairie dogs on the leased premises within six months after the beginning of this lease and must thereafter, during the term of this lease, keep the premises free from prairie dogs. It is further agreed by and between the parties hereto, that failure on the part of said lessee to comply with requirement relative to [215] killing prairie dogs shall render this lease subject to cancellation and the lessee hereto liable for liquidated damages

(Testimony of Brian Connolly.)

Defendants' Exhibit No. 4—(Continued)

in the amount of \$50. in the option of the officer in charge of the Indian agency.

16. Business Leases.—It is understood and agreed by and between the parties hereto that the lessor reserves the right to make a business lease on the premises covered by this lease and that in event such a lease is made, the lessee hereunder shall be entitled to actual damages sustained by him on account of said business lease, and to nothing more. It is further understood that in the event a dispute between the lessee hereunder and the lessee under the business lease as to the amount of such actual damages the matter will be referred to the officer in charge of the Indian agency, who shall be the sole and final judge as to the amount of the said damages.

17. Introduction and Manufacture of Intoxicants—Unlawful Conduct.—It is understood and agreed by and between the parties hereto that the lessee will not use or permit the premises covered by this lease to be used for any unlawful conduct or purpose whatsoever; that he will not use or permit the use of the leased premises, or any part thereof, for the manufacture, sale, gift, or storage of any intoxicating liquors or beverages and that he will not permit the introduction of same into or upon the leased premises, and that any violation of this provision by the lessee, or with his knowledge, shall render this lease subject to cancellation by the officer in charge of the Indian reservation.

(Testimony of Brian Connolly.)

Defendants' Exhibit No. 4—(Continued)

18. Delinquencies.—It is understood and agreed by and [216] between the parties hereto that if the lessee hereto shall fail to pay the rents when due, or to construct or place the improvements on said land as contracted for and in the manner herein provided, or shall fail to comply with or shall violate any of the provisions of this contract, the lessor, or the officer in charge of the Indian reservation, may declare the lease forfeited by giving notice as required by law, and may thereupon re-enter and take possession of the leased premises, and eject the lessee therefrom, and this lease shall thereupon be subject to cancellation by the officer in charge of the Indian reservation but such forfeiture shall not release the lessee from paying all rents contracted for or from damages for such failure or violation; and it is further understood and agreed that there shall be a lien upon all crops grown or raised upon the leased premises as a security for the payment of the rents and the making of the improvements provided for herein.

19. Delivery of Premises.—It is understood and agreed by and between the parties hereto that at the expiration of the time mentioned in this lease the lessee shall peaceably and without legal process deliver up the possession of the premises herein described in as good condition as they now are, usual wear and unavoidable accidents excepted.

20. Upon Whom Binding.—It is understood and agreed, by and between the parties hereto that the

(Testimony of Brian Connolly.)

Defendants' Exhibit No. 4—(Continued)

covenants and agreements hereinbefore mentioned shall extend to and be binding upon the heirs, assigns, executors, and administrators of the parties to this lease.

21. Must Be Approved.—It is understood and agreed by and [217] between the parties hereto that this lease shall be valid and binding only after approval by the officer in charge of the Blackfeet Indian Agency.

22. Surrender Clause Permitting Seeding Fall Small Grain.—It is understood and agreed that the lessee will surrender, without cost, the stubble land and other land in suitable condition on which he has no growing crop, to be seeded to fall grain or alfalfa five months prior to the expiration of the lease, when the lease expires at the close of the calendar year; or, prior to the expiration of the year when the lease expires on or before April 1st of the following calendar year.

23. Interest of Member of Congress.—No member of, or Delegate to Congress, or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise herefrom, but this provision shall not be construed to extend to this contract if made with a corporation or company for its general benefit.

(Testimony of Brian Connolly.)

Defendants' Exhibit No. 4—(Continued)

In Witness Whereof, the lessee and lessor have hereunto affixed their hands and seals, the day and year first above written.

BRIAN CONNOLLY,

Lessee

ALFREDA KIPP,

Lessor

Alfreda Kipp,

Lessor

Two witnesses to each signature:

Jas. W. Cross

P. O. Browning, Montana

Josie Adams

P. O. Browning, Montana

Mrs. Lorraine Munroe

P. O. 2218 - 10th St., Anacortes, Wn.

Mrs. L. M. Foster

P. O. 1320 - 10th St. Anacortes, Wn. [218]

State of Montana,

County of Glacier—ss.

On this 28th day of July, 1942, personally appeared before me Jas. W. Cross, Clerk, the above mentioned Brian Connolly and acknowledged the signing and sealing of the above indenture of lease to be their free act and deed.

I Hereby Certify that the contents, purport and effect of the lease were explained to and fully understood by the lessor, and that said lease was signed and sealed in my presence, and to the best

(Testimony of Brian Connolly.)

Defendants' Exhibit No. 4—(Continued)

of my knowledge and belief is in every respect free from fraud or deception, and that I am in no respect interested in said lease.

JAS. W. CROSS

Clerk

BOND

In consideration of the letting of the premises described in the foregoing indenture of lease, and of the sum of one dollar to each of us in hand paid, the receipt whereof is hereby acknowledged, we, the undersigned, of Rural Route No..... County,and.....of Rural Route No..... County,..... hereby become sureties for the punctual payment of all rents and performance of all the covenants and agreements in the above indenture of lease, to be paid and performed by..... the lessee named therein, and if any default shall be made therein we do hereby promise and agree to pay on demand unto the above-named officer such sum or sums of money as will be sufficient to make up such deficiency, with a 15 per cent penalty additional for improvements not made, and fully satisfy all the conditions, covenants, [219] and agreements contained in said indenture of lease without requiring any notice of nonpayment or proof of demand being made. It is agreed that this bond shall be liable for material furnished under the contract provided such material is of the kind and

(Testimony of Brian Connolly.)

Defendants' Exhibit No. 4—(Continued)
 quality called for under this contract. We we do
 hereby bind ourselves, our heirs, executors, and
 administrators, jointly and severally, firmly by
 these presents.

Signed and sealed this.....day of....., 19....
 Witnesses:

.....(Seal)
(Seal)

VERIFICATION OF SURETIES

State of....., County of.....—ss.

.....and....., the sureties to the fore-
 going indenture of lease, being duly sworn and
 severally examined by me, state that they signed
 the foregoing obligation as the sureties for the lessee
 under the annexed lease, and that they and each
 of them, respectively, own and possess property
 over and above all debts, liabilities, and legal ex-
 emptions of the value and worth the sum placed
 opposite their names.

..... \$.
 \$.

Subscribed and sworn to before me, at.....,
 this.....day of....., 19...

.....

Notary Public

My Commission expires..... [220]

(Testimony of Brian Connolly.)

Defendants' Exhibit No. 4—(Continued)

Recommended for approval.

DEPARTMENT OF THE IN-
TERIOR, United States Indian
Service, July 31, 1942.

D. A. LONGENBAUGH

Agric. Exten. Agent

The within lease is hereby approved and declared to be made in accordance with the law and the rules and regulations prescribed by the Secretary of the Interior thereunder, and now in force.

F. H. McBRIDE

United States Indian Super-
intendent.

Q. Showing you defendants proposed exhibit number five, state whether you received that from the Indian Office at Browning, Montana?

A. Yes.

Q. And did you receive it about the date, the 1st of May 1940, approximately at that time?

A. Somewhere close to it.

Q. Yes, around that time? A. Yes.

Q. Showing you the signature appearing thereon under date of June 29, 1940, C. L. Graves, do you know whose signature that is?

A. He was Superintendent at that time.

Q. He was then Superintendent of the Black-foot Indian Reservation at the time of this lease?

(Testimony of Brian Connolly.)

A. Yes.

Mr. Allan: No objections.

The Court: It may be received.

Whereupon defendants exhibit number five was received in evidence and is in words and figures as follows: [221]

DEFENDANTS EXHIBIT No. 5

5-180b

(April, 1929)

Department of The Interior

Office of Indian Affairs

Cont-1-5-8390

Write All Names in Full and be Sure to Give Correct and Full Post Office Addresses.

Farming and Grazing Lease

1561

Lease No. FG-337 Tribe Glackfeet. Allotment No. 1556

This Contract, in quadruplicate, made and entered into this 1st day of May, 1940, by and between the Indian or Indians named below (the Superintendent of the Indian Agency acting for and on behalf of minors, undetermined heirs, noncompetents, and nonresidents), hereinafter called the "lessor".

| Acct. No. | Lessors. | Year Born. | Sex. | Share T.B. | Amount |
|-----------|----------|------------|------|------------|--------|
| | | | | | Page |

See attached schedule rider

Total

(Testimony of Brian Connolly.)

and Brian Connolly of Browning, State of Montana, Rural Route No..... hereinafter called the "lessee," under and in accordance with the provisions of existing law and the regulations prescribed by the Secretary of the Interior relative to Farming and Grazing leases on restricted Indian lands, Witnesseth: That for and in consideration of the rents, covenants, and agreements hereinafter provided for, the lessor doth hereby let and lease unto the lessee the land and premises described as follows, to wit: See schedule, of Sec., Twp. 34, R. 9 West, containing 470.00 acres more or less, for the term of 3 years, beginning on the first day of May, 1940, fully to be completed and ended on the 30 day of [222] April, 1943, subject to the conditions hereinafter set forth. The lessee, in consideration of the foregoing, covenants and agrees to pay the officer in charge of the Indian agency \$70.00 per annum for the use and benefit of the lessor, as rental for the land and premises, said sum to be paid in semiannual payments as stated below:

| Date Due | Amount |
|--------------|--------|
| May 1, 1940 | 35.25 |
| Nov. 1, 1940 | 35.25 |
| May 1, 1941 | 35.25 |
| Nov. 1, 1941 | 35.25 |
| May 1, 1942 | 35.25 |
| Nov. 1, 1942 | 35.25 |

: I or we hereby agree that we will not stock the above lands in excess of 24 acres per head per year

(Testimony of Brian Connolly.)

for horses or cattle and 6 acres per head per year for sheep, or the equivalent thereof where the grazing season is less than 12 months per year.

10. Overpasturing—Stock Laws—Fertilizers.—It is understood and agreed by and between the parties hereto that the lessee will not pasture on the leased premises an unreasonable number of animals for the grass and pasture afforded; that he will observe all quarantine and other stock laws and regulations now in force of hereafter promulgated by the United States or the State authorities; and that all manure and other fertilizer which may be produced upon the leased premises shall be the property of the lessor and shall be distributed upon the leased lands.

11. Subleasing—Illegal Assignments—Transfers. It is understood and agreed by and between the parties hereto that any sublease, assignment, or transfer of this lease or of any interest therein can lawfully be made only, with the consent of the lessor in writing and the approval [223] of the representative of the U. S. Government by whom this lease is approved, or his successor in office, and that any assignment, sublease, or transfer made or attempted without such consent and approval shall be void and render this contract subject to cancellation by such officer. It is further understood and agreed by and between the parties hereto that the lessee hereto will be guilty of unlawful subleasing if he contracts, without the consent of the lessor, and the

(Testimony of Brian Connolly.)

approval of the officer in charge of the Indian agency, in writing with any other person or persons to farm or use the premises, or any part thereof, on any other basis than the payment by said lessee of so much money per hour, per day, per week, per month, or per job. It is further understood and agreed by and between the parties hereto that all share cropping or releasing for cash, all or any part of the premises, by the lessee herein, without the consent in writing of the lessor and the written approval of the officer in charge of the Indian agency, except as provided in paragraph numbered 8, hereinbefore unlawful subleasing and renders this lease subject to cancellation by said officer in charge of the Indian agency.

17. Introduction and Manufacture of Intoxicants—Unlawful Conduct.—It is understood and agreed by and between the parties hereto that the lessee will not use or permit the premises covered by this lease to be used for any unlawful conduct or purpose whatsoever; that he will not use or permit the use of the leased premises, or any part thereof, for the manufacture, sale, gift, or storage of [224] any intoxicating liquors or beverages and that he will not permit the introduction of same into or upon the leased premises; and, that any violation of this provision by the lessee, or with his knowledge, shall render this lease subject to cancellation by the officer in charge of the Indian reservation.

18. Delinquencies.—It is understood and agreed by and between the parties hereto that if the lessee

(Testimony of Brian Connolly.)

hereto shall fail to pay the rents when due, or to construct or place the improvements on said land as contracted for and in the manner herein provided, or shall fail to comply with or shall violate any of the provisions of this contract, the lessor, or the officer in charge of the Indian reservation, may declare the lease forfeited by giving notice as required by law, and may thereupon re-enter and take possession of the leased premises, and eject the lessee therefrom, and this lease shall thereupon be subject to cancellation by the officer in charge of the Indian reservation, but such forfeiture shall not release the lessee from paying all rents contracted for or from damages for such failure or violation; and it is further understood and agreed that there shall be a lien upon all crops grown or raised upon the leased premises as a security for the payment of the rents and the making of the improvements provided for herein.

19. Delivery of Premises.—It is understood and agreed by and between the parties hereto that at the expiration of the time mentioned in this lease the lessee shall peaceably and without legal process, deliver up the possession of the premises herein described in as good [225]

20. Upon Whom Binding.—It is understood and agreed by and between the parties hereto, that the covenants and agreements hereinbefore mentioned shall extend to and be binding upon the heirs, assigns, executors, and administrators of the parties to this lease.

(Testimony of Brian Connolly.)

21. Must Be Approved.—It is understood and agreed by and between the parties hereto that this lease shall be valid and binding only after approval by the officer in charge of the Indian Agency.

In Witness Whereof, the lessee and lessor have hereunto affixed their hands and seals, the day and year first above written.

BRIAN CONNOLLY

Lessee

JOHN SANDERVILLE

Lessee

JUDITH SANDERVILLE

Lessor

LEONA SANDERVILLE

Lessor

Two witnesses to each signature:

JAS. W. CROSS

P. O. Browning, Montana

LIANA LOHR

P. O. Browning, Montana

State of Montana,
County of Glacier—ss.

On this 26th day of June, 1940, personally appeared before me Jas. W. Cross, Clerk, the above-mentioned Brian Connolly and acknowledged the signing and sealing of the above indenture of lease to be their free act and deed.

I hereby Certify that the contents, purport and

(Testimony of Brian Connolly.)

effect of the lease were explained to and fully understood by the lessor, and that said lease was signed and sealed in my presence, and to the best of my knowledge and belief is in every respect free from fraud or deception, and [226] that I am in no respect interested in said lease.

JAS. W. CROSS

Clerk

BOND

In consideration of the letting of the premises described in the foregoing indenture of lease, and of the sum of one dollar to each of us in hand paid, the receipt whereof is hereby acknowledged, we, the undersigned of Rural Route No..... County, and, of Rural Route No..... County....., hereby become sureties for the punctual payment of all rents and performance of all the covenants and agreements in the above indenture of lease, to be paid and performed by...., the lessee named therein, and if any default shall be made therein we do hereby promise and agree to pay on demand unto the above-named officer such sum or sums of money as will be sufficient to make up such deficiency, with a 15 per cent penalty additional for improvements not made, and fully satisfy all the conditions, covenants, and agreements contained in said indenture of lease without requiring any notice of nonpayment or proof of demand being made. It is agreed that this bond shall be

(Testimony of Brian Connolly.)

liable for material furnished under the contract provided such material is of the kind and quality called for under this contract. And we do hereby bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Signed and sealed this.....day of, 19...

Witnesses:

..... (Seal)

..... (Seal)

[227]

VERIFICATION OF SURETIES

State of....., County of.....—ss.

.....and....., the sureties to the foregoing indenture of lease, being duly sworn and severally examined by me, state that they signed the foregoing obligations as the sureties for the lessee under the annexed lease, and that they and each of them, respectively, own and possess property over and above all debts, liabilities, and legal exemptions of the value and worth the sum placed opposite their names.

..... \$......

..... \$......

Subscribed and sworn to before me, at.....

this.....day of....., 19....

.....

Notary Public

My Commission expires.....

(Testimony of Brian Connolly.)

Recommended for approval

DEPARTMENT OF THE IN-
TERIOR, United States Indian
Service, June 29, 1940
D. A. LONGENBAUGH
Agric. Exten. Agent

The within lease is hereby approved and declared to be made in accordance with the law and the rules and regulations prescribed by the Secretary of the Interior thereunder, and now in force.

C. L. GRAVES

United States Indian Super-
intendent

The undersigned allottees and heirs hereby lease the land described hereon to Brian Connolly for a period of three years beginning May 1, 1940 and ending April 30, 1943, at the rate of fifteen cents per acre. This lease is for grazing. [228]

Allotment 1561 Sadie Kipp, SW/4 Sec. 21; W/2 SE/4 Sec. 28; W/2 NE/4 Sec. 33; Township 34 Range 9 320.00 acres—\$48.00

Heirs are

S-398 John Sanderville 1/3 s/g John Sanderville
S-274 Leona Sanderville 1/3 s/g Leona Sanderville
S-275 Judith Sanderville 1/3 s/g Judith Sanderville
Allotment 1556, Calfwoman Kipp, NE/4 SW/4,
NE/4 SE/4 SW/4, N/2 SE/4 SE/4 SW/4,
N/2 S/2 SE/4 SE/4 SW/4 Sec. 28; Township
34 Range 9 57.50 acres—\$8.63

Judith Sanderville heir by partition.

(Testimony of Brian Connolly.)

S-275 Judith Sanderville

s/g Judith Sanderville

Allotment 1556 Calfwoman Kipp, S/2 S/2 SE/4
SE/4 Sec. 28; E/2 E/2 NE/4 NW/4, S/2 NW/4
Sec. 33; Township 34 Range 9 92.50 acres—
\$13.87

Leona Sanderville heir by partition.

S-274 Leona Sanderville

s/g Leona Sanderville

—

Q. Mr. Connolly, in addition to the leases concerning which you have testified, did you have two other grazing permits upon the Indian Reservation? A. Yes sir.

Q. Showing you defendants proposed exhibit number six, state if that instrument was delivered to you by the Indian Agency Office at Browning, Montana. I believe this is a duplication of that. That is a duplication, we will withdraw defendants six. That is a duplication of exhibit one. We will withdraw six.

Q. Showing you defendants proposed exhibit number seven, state if that document was delivered to you by the Indian Agency Office at Browning, Montana? [229] A. Yes.

Q. And the signature appearing thereon as Brian Connolly, is that your signature?

A. Yes.

(Testimony of Brian Connolly.)

Q. And the signature Thomas L. Carter, Regional Forester, is Mr. Carter's signature?

A. I believe it is.

Mr. Allan: No objection.

The Court: Offered and received without objection.

Whereupon Defendants exhibit number seven was received in evidence without objection, and is in words and figures as follows, to-wit:

DEFENDANTS EXHIBIT No. 7

Range Unit #185-S

United States

Department of the Interior

Office of Indian Affairs

Grazing Permit

Permit fee \$2.50

(Write all names in full)

U. S. Indian Service. Forestry & Grazing. Received May 2 1942

Blackfeet Indian Agency Browning, Montana

By authority of law and under regulations prescribed by the Secretary of the Interior, Brian Connolly, or Browning Montana, is hereby granted permission to hold and graze livestock on the Blackfeet Indian Reservation for a period beginning May 1, 1942, and terminating not later than April 30, 1943, on the range unit usually known or described as follows: Range Unit No. 185-S com-

(Testimony of Brian Connolly.)

Defendant's Exhibit No. 7—(Continued)

prising 805.00 acres of Indian land as per schedule attached, including all unreserved tribal land as authorized by Blackfeet Tribe and all unfenced Indian [230] allotments on which authority to grant grazing privileges have been secured, and covering livestock in kind and numbers, for the grazing period, and at the rate per head as shown in the following schedule, subject to the payment of all fees and full compliance with the attached range control stipulations which are made a part of this permit: [231]

(Testimony of Brian Connolly.)

Defendant's Exhibit No. 7—(Continued)

| Year | Number of Head | Kind of Stock | Grazing Period | | Rate per Head | Amount | Payable | |
|------|-------------------|---------------|----------------|---------|---------------|----------|---------------------|----------|
| | | | From— | To— | | | One-half | One-half |
| 1942 | 33 | Cattle | 5/1/42 | 4/30/43 | \$3.66 | \$120.75 | in full on approval | |

Unless authorized by the Superintendent of the Blackfeet Indian Reservation in writing, only livestock bearing the brands and marks herein shown shall be grazed under authority of this permit:

| | | | | |
|----------------|-----------|--------------|---------------|----------|
| Cattle Branded | Ear Marks | Horse Brands | Sheep Branded | Ear Mark |
| R | R | R | Wool Brand | R |
| | L | L | | L |

[232]

(Testimony of Brian Connolly.)

Defendant's Exhibit No. 7—(Continued)

This permit is issued with the understanding that head of will be grazed on this range, percent of which is Indian land and percent privately owned or leased range, evidence of the right to the use of which is recorded with (Delete)

It is further understood and agreed that if the permittee allows a greater number of livestock than the total number herein stipulated to graze upon this range unit of which the Indian range is a part, during the period this permit is in effect, this on-and-off clause shall immediately become null and void and the stock in excess of the number upon which fees are paid to the Indians shall be considered as in a state of trespass and treated accordingly.

In consideration of the above privileges the permittee agrees to pay to the Superintendent of the Blackfeet Indian Reservation for the use and benefit of the Indians entitled to occupy the lands above described, the sum of money found to be due from the permittee according to the provisions of this permit (calves, colts and lambs under 6 months of age not to be counted), and he further agrees to pay the grazing fees annually in advance. Unless the grazing fees shall be paid in advance for the full term of the permit, these payments will be guaranteed by an acceptable corporate surety bond in a penal sum of not less than the total amount due in any 1 year under the terms of the permit, namely,

(Testimony of Brian Connolly.)

Defendant's Exhibit No. 7—(Continued)

one hundred twenty and 75/100 (\$120.75) (with a maximum limit of \$25,000), or by a bond for the same amount with at least four individual sureties who shall each qualify [223] in an amount equal to twice the amount of the bond, or by depositing a cash bond with the Superintendent of the Black-foot Indian Reservation equal to one-half of the annual grazing fees; said cash deposit to be credited on the last installment due on the permit, provided the terms of the permit have been faithfully carried out by the permittee.

It is understood and agreed by the permittee that this instrument is not a lease and is not to be taken or construed as granting any leasehold interest in or to the land described herein, but that it is a permit terminable and revocable in the discretion of the approving and concurring officers, and in any event not to extend beyond April 30, 1943.

It is also understood and agreed that any part of the area covered by this permit may be excluded from this range unit by the approving and concurring officers in the exercise of their discretion, by the transfer of title through sale of allotted land, or by the extinguishment of the Indian right of occupancy of the lands; and thereupon this permit shall cease and determine as to the parts of the range unit thus eliminated, the number of stock stipulated shall be reduced in conformity thereto, and the payments due hereunder shall be adjusted accordingly, provided that the termination of the permit has not been due to the fault of the permittee or

(Testimony of Brian Connolly.)

Defendant's Exhibit No. 7—(Continued)

to a violation of the terms of this permit by or on behalf of the permittee.

The permittee hereby agrees that he and his employees will not use any part of the range unit for [234] the sale, manufacture, storage, or drinking of intoxicants or the handling of narcotics, and neither he nor his employees will take part in immorality or any illegal practices whatever in or upon the reservation. Violation of this clause will be deemed sufficient ground for cancelation of the permit.

All livestock grazed under this permit and all other property used in connection with the permit shall be held as security for the payment of any grazing fees due and for the full performance of the agreement, and all payments due hereunder shall constitute a prior and first lien upon said livestock and other property incidental to the enjoyment of the privileges granted. The Agency office contains public records of the United States pertaining to trust Indian allotments and all persons are charged with notice and knowledge thereof. A copy of each permit must be filed promptly in the Agency office. Such copy shall be available at all times for public inspection. If the permittee so desires he may file or record a copy of the permit, at his own expense, in the proper county office.

This permit shall not be assigned, sublet, or transferred without the written consent of the sureties and the approving and concurring officers.

(Testimony of Brian Connolly.)

Defendant's Exhibit No. 7—(Continued)

The Superintendent and the Regional Forester shall make decisions relative to the interpretation of the terms of the permit and the range control stipulations which are attached hereto, and the terms of the permit cannot be varied in any detail except as herein provided without the written approval of the surety, the permittee, and [235] the issuing officers.

Done at the Blackfeet Indian Agency, this 17th day of March, 1942.

(Stamped)

(Signed) ROY NASH [Seal]

Superintendent

Concurred in May 2 1942

THOMAS L. CARTER

Regional Forester

I accept the permit with the foregoing conditions and the attached range control stipulations.

[Seal]

BRIAN CONNOLLY

Permittee [236]

(Testimony of Brian Connolly.)

Defendant's Exhibit No. 7—(Continued)

| No. | Allottee | Description | Unit No. 185-S | | | |
|--------------------|----------------------|--|----------------|----|---|----------|
| | | | S | T | R | Acres |
| 2751 | John Harold Brown | N $\frac{1}{2}$ NE $\frac{1}{4}$, N $\frac{1}{2}$ S $\frac{1}{2}$ NE $\frac{1}{4}$, | 21 | 33 | 9 | 120.00 |
| 1587 | William Cobell #1 | SW $\frac{1}{4}$ SE $\frac{1}{4}$, | 16 | | | 40.00 |
| 1979 | Ora Cobell | NW $\frac{1}{4}$ SE $\frac{1}{4}$ | 16 | | | 40.00 |
| 1983 | Walter McGowan | SE $\frac{1}{4}$ SE $\frac{1}{4}$, NE $\frac{1}{4}$ SE $\frac{1}{4}$ | 16 | | | 40.00 |
| 1980 | Jeanette McGowan | SE $\frac{1}{4}$ SE $\frac{1}{4}$ | 16 | | | 40.00 |
| 2822 | Ferdinand Cobell | SW $\frac{1}{4}$ SW $\frac{1}{4}$ | 15 | | | 40.00 |
| 3371 | Minnie Tabor | NE $\frac{1}{4}$ SW $\frac{1}{4}$ | 15 | | | 40.00 |
| 2823 | Leslie Cobell | SE $\frac{1}{4}$ SW $\frac{1}{4}$ | 15 | | | 40.00 |
| 2261 | Frank Bostwick | NW $\frac{1}{4}$ SE $\frac{1}{4}$ | 15 | | | 40.00 |
| 2252 | Mary Bostwick | SW $\frac{1}{4}$ SE $\frac{1}{4}$ | 15 | | | 40.00 |
| 2257 | James Bostwick | NW $\frac{1}{4}$ NE $\frac{1}{4}$ | 22 | | | 40.00 |
| 2422 | Collins Anderson | N $\frac{1}{2}$ NW $\frac{1}{4}$, That part of S $\frac{1}{2}$ NW $\frac{1}{4}$ north of R. R. | 22 | | | 125.00 |
| 3240 | Mary M. Pierre | NW $\frac{1}{4}$ SW $\frac{1}{4}$ | 14 | | | 40.00 |
| 3241 | John Theodore Pierre | SW $\frac{1}{4}$ SW $\frac{1}{4}$ | 14 | | | 40.00 |
| 2253 | Henry Bostwick | SE $\frac{1}{4}$ SE $\frac{1}{4}$ | 15 | | | 40.00 |
| 2258 | Isabel Bostwick | NE $\frac{1}{4}$ NE $\frac{1}{4}$ | 22 | | | 40.00 |
| Total of Unit..... | | | | | | 805.00 |
| | | | | | | \$120.75 |

[237]

(Testimony of Brian Connolly.)

Defendant's Exhibit No. 7—(Continued)

LEGEND

RANGE UNIT MAPS

Permittee Brian Connolly

Range Unit No. 185-S

Permit Period 5/1/42 to 4/30/43

| | | |
|-------------------------------------|---|--------------|
| <input checked="" type="checkbox"/> | Trust allotments on which authority to grant grazing privileges have been obtained..... | 805.00 acres |
| <input type="checkbox"/> | Tribal land | acres |
| <input type="checkbox"/> | Submarginal land | acres |
| <input type="checkbox"/> | Trust allotments owned by family using range unit | acres |
| <input type="checkbox"/> | Patent in fee or deeded land included in "on and off" | acres |
| <input type="checkbox"/> | Trust allotments on which authority has not been obtained and not included in permit..... | acres |
| <input type="checkbox"/> | Patent in fee or deeded land not included in "on and off" clause | |
| <input type="checkbox"/> | | acres |
| <input type="checkbox"/> | | acres |
| | Total..... | 805.00 acres |

(Testimony of Brian Connolly.)

Defendant's Exhibit No. 7—(Continued)

LEGEND

RANGE UNIT MAPS

Permittee Brian Connolly Range Unit No. 185-S
 Permit Period 5/1/42 to 4/30/43

| | | |
|-------------------------------------|---|--------------|
| <input checked="" type="checkbox"/> | Trust allotments on which authority to grant grazing privileges have been obtained..... | 805.00 acres |
| <input type="checkbox"/> | Tribal land | acres |
| <input type="checkbox"/> | Submarginal land | acres |
| <input type="checkbox"/> | Trust allotments owned by family using range unit | acres |
| <input type="checkbox"/> | Patent in fee or deeded land included in "on and off" | acres |
| <input type="checkbox"/> | Trust allotments on which authority has not been obtained and not included in permit..... | acres |
| <input type="checkbox"/> | Patent in fee or deeded land not included in "on and off" clause | |
| <input type="checkbox"/> | | acres |
| <input type="checkbox"/> | | acres |
| | Total..... | 805.00 acres |



(Testimony of Brian Connolly.)

Defendant's Exhibit No. 7—(Continued)

United States

Department of the Interior

Office of Indian Affairs

Range Control Stipulations

1. Grazing Permits.

Grazing permits on Indian reservations are issued subject to certain restrictions and regulations, and with the distinct understanding that the ranges will be reduced both in size and carrying capacity whenever the Commissioner of Indian Affairs shall consider such action essential to the protection of the interests of the Indians. Grazing permits cover Indian lands only, inclusive of unallotted land not otherwise disposed of and all unfenced [238] allotments on which powers of attorney have been executed to the superintendent authorizing him to act for the allottees. Permits must be executed within thirty days after the receipt of notification of an award.

2. Payment of Grazing Fees.

Grazing fees shall be paid annually or semi-annually in advance, as specified in the permit. No charge will be made for animals under six months of age at the time of entering the reservation, which are the natural increase of the stock upon which fees are paid. Payments will be made for calves colts, and lambs over six months old for the time grazed on the reservation after that age is reached at the same rate as for full grown stock.

(Testimony of Brian Connolly.)

Defendant's Exhibit No. 7—(Continued)

3. Excess or Deficit of the Number of Stock Specified.

Unless the number of livestock specified in the permit is reduced by the Commissioner of Indian Affairs, the permittee will not be allowed credit or rebate in case the full number is not grazed on the area. However, if the number authorized is exceeded, without previous authority, the permittee will be required to pay in addition to the regular charges as provided in the permit, a penalty equal to 50 per cent thereof for such excess stock and the stock will be held until full settlement has been made.

4. Crossing Permits.

Livestock shall not be driven upon or across any reservation without first securing a standard form crossing permit No. 5-929, properly signed by an authorized official of the Indian Service. This permit will state the number of head, dates of travel, class of stock, trail to be used, [240] and destination. Such stock must be moved not less than 5 miles in case of sheep and 10 miles in case of cattle each day, and stock shall not remain more than 12 hours at any bed ground or camping place. In case of unnecessary delay, or willful trespass, the superintendent or his authorized agent shall assess and collect such damages as may seem reasonable. Owners of stock will anticipate their time of entry and secure a permit well in advance of the date when the stock will enter upon the reser-

(Testimony of Brian Connolly.)

Defendant's Exhibit No. 7—(Continued)

vation. All stock will be refused entry upon the reservation until a permit to enter has been issued. The agency office and the officer in charge must be notified at least 5 days in advance in order that arrangements may be made for an official to meet the stock. Stock owners who introduce their stock upon the reservation without proper authority will be considered as trespassers and their stock will be removed from the reservation and denied the right to return. The right is hereby reserved to issue crossing permits over all ranges, regardless of whether or not special driveways have been established thereover, and provided that the movement of stock so authorized shall be effected under the supervision of the superintendent or his agent. A permittee will not authorize another permittee to drive stock across his range.

5. Quarantine Regulations.

A.. stock covered by permit is subject to the quarantine laws and regulations now in force or hereafter to be promulgated by the United States and the State in which the reservations are situated. [241]

6. Law and Order.

All regulations relative to the maintenance of law and order on Indian reservations and those forbidding the introduction of intoxicating liquors will be complied with by the permittee and his employees.

(Testimony of Brian Connolly.)

Defendant's Exhibit No. 7—(Continued)

7. Entering the Range.

The earliest date upon which stock will be permitted to enter the range will be the date shown in the permit. Notice must be given to the superintendent prior to entering the reservation. On reservations where permanent driveways have been established all livestock will be required to enter or leave the reservation on the particular driveway designated by the superintendent. On reservations where driveways have not been established and roads and trails are used for the movement of livestock, the route to be followed will be the most practicable one available and will be designated by the superintendent.

8. Counting of Livestock.

All livestock grazing upon or crossing Indian reservations must be counted by an authorized officer of the Indian Service. Arrangements should be made for counting all livestock before it enters the reservation. Permittees are required to notify the superintendent a sufficient length of time in advance to permit him to have a representative present when stock are counted on or off the reservation. The right is reserved by the Indian Service to have a representative present at each round-up to check the number of stock, and in the event that the permittee shall fail or refuse to round-up his stock at proper times and in a satisfactory manner for the purpose [242] of allowing a count of the stock, the superintendent shall have the right to

(Testimony of Brian Connolly.)

Defendant's Exhibit No. 7—(Continued)

round-up and count said stock at the expense of the permittee.

9. Branding of Stock.

All livestock grazed under permit on Indian reservations or livestock which is authorized to cross said reservations under formal crossing permit must be branded so as to be identified. The brands of all livestock grazed upon the reservation under permit must be recorded in the office of the superintendent with the owner's name.

10. Affidavit of Permittee.

If grazing permits are issued for a period exceeding one year, the permittee will be required to execute (or have executed by a competent foreman) an affidavit showing the number of livestock grazed under authority of such permit and on hand at the close of June of each year, and, in case of occupancy of the area during the previous winter, the number carried over, if any; and another affidavit at the close of December of each year showing the livestock then on hand and the number carried during the summer of that year, or such period as may be required by the Commissioner of Indian Affairs. Affidavits should be made on standard form 5-370.

11. Camp Record.

A camp record showing the number of each camp, approximate number of days of feed available, dates used, and losses from predatory animals, etc., will

(Testimony of Brian Connolly.)

Defendant's Exhibit No. 7—(Continued)

be required in connection with all sheep grazing permits. Reports should be made by the permittee at the close of each [243] grazing season on standard form 5-518. A record should also be made of all predatory animals killed on the range unit by the permittee and his employees and a report made to the superintendent. In States where bears are protected by law only such bears may be killed as are actually killing or attempting to kill livestock.

12. Camp Fires.

Camp fires must not be built against logs, stumps, or trees. The ground around the fire must be cleared of all inflammable material to at least a distance of 6 feet on all sides. The fire itself must be built in a hole cut at least 10 inches into the mineral earth. The camp fire must be completely put out with water or mineral earth whenever the camp is left alone even for a short time. It is suggested that stoves be used in camp whenever possible, in order to decrease the fire hazard. Each camp outfit must include a shovel and an ax, each in good condition.

13. Smudge Fires.

Smudge fires must not be made unless absolutely necessary. They must never be made in places which have not been fully cleared for a distance of 25 feet on all sides. A smudge fire must never be made near the roots of a tree, in or near a stump or snag, and must be close to and in plain sight of camp. Such fires, when not serving the

(Testimony of Brian Connolly.)

Defendant's Exhibit No. 7—(Continued)

purpose for which they are made and when the camp is deserted or moved, must be immediately and completely extinguished with water or by burying with mineral earth.

14. Conduct in Case of Fire.

Whenever a permittee discovers an unauthorized and [244] uncontrolled fire burning, whether started by his own carelessness or in some other way, he should put it out if he can. If it can not be put out or placed under temporary control, it should be reported to the nearest forest or grazing officer as soon as possible. In case of fire all range users are expected to place themselves and their employees at the service of the forest or grazing officer in charge for such work in connection with the fire as the officer may request. The failure of any permittee to cooperate to the fullest extent possible in the control of forest and range fires may result in the immediate cancellation of any permits which he may hold and his removal from the reservation. The unauthorized setting of a fire or carelessness in connection with an authorized fire may result in criminal prosecution under Section 6 of the act of June 25, 1910 (36 Stat. L., 855-857).

15. Trespass.

All permittees must avoid trespassing. In case of trespass the herder and packer may be excluded from the reservation. The owner is liable to prosecution for civil damages. When upon the reservation the herder, packer, and camp mover must

(Testimony of Brian Connolly.)

Defendant's Exhibit No. 7—(Continued)

understand that should the instructions of their employer and the forest or grazing officer disagree as to the manner in which the range should be used, they must follow the instructions of the officer. Ordinarily the grazing movements of stock of a permittee within the range assigned him will not be interfered with, but the superintendent reserves the right to direct such movement whenever he deems it [245] necessary for the proper protection and utilization of the range. The following acts constitute trespass:

(a) The grazing upon or the driving of any stock across the reservation without a written permit, or the grazing upon or the driving across any reservation in violation of the terms of a permit.

(b) The grazing of stock upon Indian land within an area closed to grazing of that kind of stock.

(c) The grazing of stock by a permittee or lessee upon an area withdrawn from use for grazing purposes.

(d) Allowing stock to drift and graze upon the reservation without a written permit.

(e) Violation of any of the terms of the grazing permit or crossing permit.

(f) Refusal to move stock upon instructions of an authorized officer of the Indian Service when an injury is being done to the range or forest by reason of improper handling of the stock.

(Testimony of Brian Connolly.)

Defendant's Exhibit No. 7—(Continued)

16. Damage to Roads, Trails, or Springs.

And person or persons to whom grazing permits or crossing permits have been issued receive such permits with the understanding that they are obligated to repair all damage to roads or trails caused by the presence of their stock in any part of the reservation. Permittees must build any new roads, trails, or bridges found necessary for the proper handling of their stock. They must also fence any springs or seeps on Indian land which are being damaged by the trampling of their stock, if they shall be ordered to do so by the superintendent or his duly authorized representative. [246]

17. Damage to Indian Property.

The permittee will exercise due precaution to prevent injury to the premises or livestock of Indians and will be required to return to the vicinity of any Indian's home any livestock belonging to such Indian which may have strayed through the handling of stock under this permit or drifted away with the permittee's herd. The permittee will be required to reimburse the Indians for any damage that may be done to their premises or livestock through the acts of the permittee, his employees, or livestock.

18. Bedding Sheep.

The bedding ground must be changed every day unless some natural condition will not allow the change to be made. Where possible the bedding out system will be used. Except where camp wagons

(Testimony of Brian Connolly.)

Defendant's Exhibit No. 7—(Continued)

are used no bed ground will be occupied for more than two nights, and where camp wagons are being used three nights will be the maximum time allowed. Failure to observe these rules will result in that part of the range being withdrawn from the grazing area and possible removal of the stock from the reservation. The trailing of sheep into and out from a permanent bed ground will not be allowed. Bed grounds where possible will be located at least one-quarter of a mile from a running stream, spring, or other water.

19. Disposition of Carcasses.

The carcasses of all animals which die upon the reservation from contagious or infectious diseases must be burned at once, and the carcasses of all animals which die close to water, trails, or other places where they will be a [247] nuisance must be removed immediately and buried or burned. The same extreme care should be taken when building or putting out a fire for burning a carcass as in case of a fire for any other purpose.

20. Salting of Stock.

When the forest or grazing officers shall require it all stock grazed under permit must be salted regularly at such places and in such manner as may be designated. This rule applies more particularly to cattle but on some ranges may also apply to sheep. The use of troughs is advocated and these should be placed on rocky ground and well removed from water. Under no conditions will salt be placed

(Testimony of Brian Connolly.)

Defendant's Exhibit No. 7—(Continued)

at or near water. The proper use of salt on all ranges should aid in preventing stock from remaining too long at watering places and thereby permanently damaging the feed. Stock will alternate between salt and water if the two are widely separated and will consume as much range around a salt ground as around a water hole.

21. Handling of Sheep.

The open-herding system of handling sheep should be used on all ranges where applicable. The principal points in this system are:

(a) Herding in the lead of sheep instead of in the rear, and training them to spread out and graze quietly.

(b) Grazing rather than driving when going to and from water.

(c) Bedding down the sheep on fresh bed grounds where night overtakes them, with proper selection of bed grounds so the sheep will be contented.

(d) Camping close to the sheep each night by using a burro or horse to pack the herder's food and bed, or packing the herder's outfit with a saddle horse from a central camp. [248]

(e) Using dogs as little as possible after the sheep are properly trained and keeping dogs principally to protect the flock from predatory animals.

(f) Ewes with lambs will invariably graze around the bed ground before leaving. For this

(Testimony of Brian Connolly.)

Defendant's Exhibit No. 7—(Continued)

reason ewes and lambs should never be camped twice in the same place, if avoidable.

22. Protection of Game, Fish, and Birds.

It is expected that herders and other employees will comply with the game laws of the State in which the reservation is located and will assist the forest, grazing, and State officers in the enforcement thereof, and they will be required to comply with all regulations of the Indian Service regarding fish and game.

23. Range Improvements.

It is the policy of the Service to encourage the construction of improvements necessary for the proper management of livestock and the utilization of the range. Proper range improvements will make available much feed which could not otherwise be utilized. However, the cost of such improvements will be borne by the permittee unless otherwise provided for in the permit.

24. Condition of Camping Ground.

Camp grounds must be kept in a clean and sanitary condition. All rubbish, tin cans, etc., must be properly burned or buried during occupancy or upon removal to new sites.

25. General Conduct.

These stipulations have been made for the assistance and guidance of permittees and become a part of their grazing permits. If faithfully carried out they will promote the best interests of all concerned. This fact [249] should be recognized by

(Testimony of Brian Connolly.)

Defendant's Exhibit No. 7—(Continued)

livestock owners and a spirit of hearty cooperation maintained. The Service desires permittees who will work with the forest and grazing officers. Those who comply with the stipulations will be given every reasonable consideration consistent with good business management, while those who disregard them will be denied the privilege of further grazing upon Indian reservations.

26. Applicability of Stipulations.

The above range control stipulations are hereby prescribed for use in all grazing permits except as special provision shall be made by the Commissioner of Indian Affairs.

27. Interpretation of Stipulations.

The final interpretation of these stipulations shall rest with the Secretary of the Interior.

DEPARTMENT OF THE IN-
TERIOR, OFFICE OF IN-
DIAN AFFAIRS, WASH-
INGTON

Approved: May 29, 1931.

C. J. RHOADS,
Commissioner

DEPARTMENT OF THE IN-
TERIOR, OFFICE OF THE
SECRETARY, WASHING-
TON

Approved: June 4, 1931.

JOS. M. DIXON

First Assistant Secretary

(Testimony of Brian Connolly.)

Q. Mr. Connolly, in the summer of 1941, how many head of cattle were you running altogether of your own, yours and Dan's?

A. I don't think there was over one hundred and thirty, [250] possibly one hundred and forty.

Q. One hundred and thirty head?

A. Possibly one hundred and forty.

Q. It would not exceed one hundred and forty?

A. I do not think so.

Q. Might be less? A. Yes sir.

Q. And where were you yourself living at that time in 1941 with respect to these various tracts?

A. I was living on Willow Creek.

Q. On Willow Creek? A. Yes sir.

Q. And by Willow Creek, to what land do you refer?

A. That is permit one hundred and eighty-five, that they call permit one hundred and eighty-five now.

Q. That has been received in evidence?

Mr. Allan: We did not offer it.

Mr. McCabe: That is defendants' exhibit number seven.

Q. And at that time did you have in your employ any person at all that was helping to herd or helping take care of your cattle?

A. No sir.

Q. Did you have any of the members of your family helping you at that time?

A. Yes, all the boys was.

(Testimony of Brian Connolly.)

Q. You mean the boys that you have testified to, as to their ages, Dan, and the other boys?

A. Yes sir.

Q. And in handling your cattle, Mr. Connolly, what [251] *what* was your practice as to endeavoring to keep them on the land for which you had the right to graze, for instance, the Unit twelve and these other lands concerning which you have testified?

A. We tried to keep them on that Unit as much as we could.

Q. And how did you handle that with respect to every day going out and looking for any of your livestock?

A. Well, the boys go out every morning.

Q. At your instructions? A. Yes sir.

Q. And what were your instructions to them as to keeping any of your cattle on its own range?

A. We wanted to get them back to this water hole at least by noon.

Q. And you told them every day to bring the stock back to your own range?

A. On our own water hole or reservoir.

Q. And by the water hole or reservoir, do you mean the reservoir or water hole embraced on the land in Unit twelve?

A. Yes, the reservoir is in twelve.

Q. And that reservoir is all on land on which you had a permit at that time? A. Yes.

(Testimony of Brian Connolly.)

Q. And did you likewise yourself in addition to the boys herding or riding around, did you likewise ride around yourself to keep your stock on your own home range?

A. Yes, we made a trip over there once or twice a week. [252]

Q. Would you do that once or twice a week to supplement the work of the boys? A. Yes sir.

Q. In riding around would you find that some of the time that your stock had strayed on some of the adjoining land?

A. Yes, they always have done that.

Q. In riding around and getting your stock to turn them back, did you observe other stock ranging in that area during the period of 1941?

A. Yes sir.

Q. And do you know whose other stock, and the number of head that was ranging on this adjoining area, adjoining Unit twelve in 1941?

A. We did not make a count on all of them, but we made a count on some of them.

Q. Tell us during that time the number of head and who they belonged to, if you know?

A. That was in 1941?

Q. Yes.

A. There was around *forth* head of Devereaux' cattle, and Gobert's.

Q. And who else, just name those that you can think of and the number?

A. And Mrs. Perrin with about four or five brands too.

(Testimony of Brian Connolly.)

Q. How many head of cattle?

A. Well, there was all the way from say from five to six up to thirty or forty.

Q. Is there any other, just name them, one right after the other? [253]

A. Ornstad Brothers had some in there.

Q. How many head?

A. They had all the way from ten up to fifty or two hundred head, and we have seen all the way from one to forty head of Fred Lewis' in there.

Q. And would those cattle be on this area testified to this morning by Mr. Stephenson, and the other witnesses for the Government, where they had seen some of your cattle at different times?

A. I didn't quite get that question.

Q. Would you see cattle or livestock of other persons than your own on this area where the witnesses testified this morning, these different sections that you or they saw your stock at times?

A. Yes, there was always some stock of other people mixed with mine.

Q. How about the fence around the area in Unit twelve, and west, north and south?

A. There ain't any. One just at the place.

Q. And that is the fence around your hay meadow and house?

A. It is a hay meadow. We have a horse pasture, and there is a hay meadow in the other. Practically three sections of fence.

Q. Practically three sections are fenced?

A. Yes sir.

(Testimony of Brian Connolly.)

Q. Is there any other fence of any kind or character in that area of Unit twelve, or in any area where the lands are located, which the witnesses testified concerning this morning?

A. You can go west and strike no fence for thirty miles.

Q. On the west? [254] A. Yes.

Q. On the south, how far would you go before striking a fence? A. About six miles.

Q. And on the north?

A. About three or four miles.

Q. Did you ever at any time drive any of your cattle knowingly on any of the land, other than you had, that was embraced in your Unit and permits concerning which you have testified to?

A. No sir.

Q. Were your instructions to the boys concerning which you have testified, at all times to keep the cattle on their own range? A. Yes sir.

Q. And, Mr. Connolly, did anybody at any time, Government or otherwise, come to you and make any statement to you that your cattle were trespassing or grazing on somebody else's land?

A. Not until the 4th day of August of 1941.

Q. And how did you learn that?

A. That was by letter.

Q. And did that letter state where the cattle were grazing?

A. No, they just said it was in trespass.

(Testimony of Brian Connolly.)

Q. The letter just stated that your cattle were in trespass?

A. Yes, I believe you have a copy of the letter there.

Q. After you got the letter, did you go out upon the land to see if any of your stock were off of your range? [255]

A. We had always been doing that before that.

Q. And after you got that letter, did you go out to see if any of your stock was out there?

A. We put them right back on.

Q. And how long after you received the letter did you do that?

A. We have been on it ever since.

Q. No, down to the time when you received the letter, how long a period of time after you received that letter did you go out and throw your stock back?

A. We never did throw them back off of my land.

Q. On to your lease. You got the letter on a certain date? A. Yes.

Q. And then you went out to see if there were any of your stock on the adjoining land?

A. Yes.

Q. When did you go out, as soon as you got the letter, or when?

A. I believe I stated that we done it before that, and we have been doing it ever since.

Q. What I am getting at, is how long a period of time was it from the time you received that letter until you went out to see if there was any

(Testimony of Brian Connolly.)

stock trespassing?

A. I went out right away.

Q. The same day?

A. Probably not the same day I got the letter, when I got to town. I didn't go out until the next day.

Q. The following day? A. Yes, sir. [256]

Q. And what time, do you recall of the day was it that you received the letter, in the afternoon?

A. I think it would be in the morning. We start to town, when we start to town we get to town in the morning.

Q. About noon?

A. Less than that, around nine maybe, we go pretty early.

Q. Now, Mr. Connolly, did you hear the testimony of Mr. Stephenson relative to permission for moving cattle back and forth? A. Yes, sir.

Q. When you were moving your cattle back and forth from the different units or ranges, did you communicate that information, or tell the Indian Office what you were doing or going to do?

A. It is not necessary under the rules and regulations to do it.

Q. By what particular regulation or rule do you refer to?

A. There ain't anyone testified you have to do that.

Q. Is there any regulation that has ever been called to your attention requiring an Indian who is moving stock to obtain a permit?

A. There ain't. Not that I know of.

(Testimony of Brian Connolly.)

Q. They have never shown you any such regulation? A. No, sir.

Q. And you say there is no such regulation?

A. I have looked through the book. [257]

Q. And you cannot find any regulation requiring that of an Indian? A. No, sir.

Q. Now, was that the only notice or only writing, or only objection that you received concerning your stock having trespassed from any source?

A. I believe so. I received some later on.

Q. Was that oral, or by letter?

A. By letter, I believe.

Q. How? A. By letter.

Q. And how many times after that did you receive letters of that character?

A. I would now say for sure, at lease once anyhow.

Q. When you received that letter, did you likewise go up and examine the range and turn back any stock you found of yours off your range?

A. It was our practice to do it anyway, without the letter.

Q. It is your practice to do it anyway?

A. Yes, sir.

Q. And did you do that right along?

A. Yes.

Q. Now, after,—since this action was instituted, Mr. Connolly, did you seek to obtain additional land to lease from the Indian Department?

A. Yes, after we heard of this Injunction, after

(Testimony of Brian Connolly.)

they started this Injunction against me, I thought I better get some more land.

Q. So that after this action was started, you wanted [258] some additional land for cattle, and you took it up with them? A. Yes, sir.

Q. And did you receive any letters or communications from Mr. McBride in connection with such request of yours for leasing?

A. I had several of them.

Q. And did this land that you wanted to lease, was that some of the land embraced in these range units that were testified to, or allotments that were testified to this morning by Mr. Stephenson and other witnesses?

A. Yes, some of them, yes.

Q. How many sections was it that you started to obtain leases on?

A. I believe one of the letters states only one section.

Q. How many did you ask for?

A. I asked for four sections.

Q. After you took that matter up with the Indian Office, did you receive a communication from Mr. McBride, or did he hand you a writing?

A. It was mailed to me.

Q. You received that by registered mail?

A. It was not registered.

Q. Just ordinary mail?

A. Just ordinary mail.

Q. And that is defendants proposed exhibit number eight? A. Yes, sir.

(Testimony of Brian Connolly.)

Q. And after you received that, did you discuss the contents of this letter with Mr. McBride?

A. I did. [259]

Q. And he admitted sending it to you?

A. Yes.

Mr. McCabe: We not offer in evidence defendants exhibit number eight.

The Court: Any objections?

Mr. Allan: We object because it is not material in this action.

Mr. McCabe: The purpose is to show that in the complaint it is alleged that the defendants will continue to try to drive their stock and trespass livestock on this area without getting the consent of the Indian Department. That reflects upon the question of the Injunction being made permanent, to show that he made no willful intent to trespass. It merely illustrates he had no willful intent to trespass.

Mr. Allan: We will withdraw the objection.

The Court: It may be received.

Whereupon defendants exhibit number eight was received in evidence without objection, and is in words and figures as follows, to-wit:

DEFENDANTS EXHIBIT No. 8

Forestry & Grazing

301.1

Unit No. 12

United States

Department of the Interior

Office of Indian Affairs

Field Service

(Testimony of Brian Connolly.)

Browning, Montana
January 4, 1943.

Mr. Brian Connolly
Browning, Montana.

Dear Mr. Connolly:

In accordance with Office instruction under [260] date of December 22, it will be necessary for you to bid in competition for grazing privileges. A copy of the advertisement will be sent to you at a later date. For your convenience kindly be advised that the area you requested for allocation is known as Unit No. 12 and 185.

In regard to your request for additional land to be added to Unit 12 kindly be advised that this addition will be impossible. As you know the temporary restraining order issued by the Federal Court covers a portion of the land for which you made application. For this reason until such a time as final action is obtained in the Court in regard to the trespass action, we cannot give you permission to graze your livestock on this land.

Very truly yours,

F. H. McBRIDE,

Superintendent.

ADS:je

Copy

(Testimony of Brian Connolly.)

Q. Did Mr. McBride hand you this exhibit marked defendants exhibit number nine?

A. I believe he mailed it; mailed it to me.

Q. And after you received it in that manner, did you discuss the contents of it with Mr. McBride? A. Yes, sir.

Q. And Mr. McBride is Superintendent at Browning, Montana, for the Blackfeet Indian Agency? A. Yes, sir.

Q. And showing you also defendants proposed exhibit ten, state whether or not that was delivered to you by Mr. McBride?

A. I believe this was mailed to you and you mailed it [261] to me.

Q. This letter? A. Yes, sir.

Q. You didn't get a copy of this letter?

A. You mailed it to me.

Q. Other than getting it from me?

A. No, sir.

Mr. Allan: No objections.

The Court: It may be received in evidence.

Whereupon defendants exhibit number nine was received in evidence and was and is in words and figures as follows, to-wit:

(Testimony of Brian Connolly.)

DEFENDANTS EXHIBIT No. 9

Billings, Montana,
January 12, 1943.

Mr. F. H. McBride,
Superintendent,
Blackfoot Indian Agency,
Browning, Montana.

Re: United States v. Brian Connolly, et al

Dear Mr. McBride:

This office is in receipt of your letter of January 9, 1943, together with its enclosure.

We believe that it will be necessary for Brian Connolly to petition the court and ask it to modify the injunction pendente lite that is now pending against him before he will be authorized to make arrangements through your Agency for his live-stock to graze the lands about which you write.

I will be in Great Falls, Montana, to attend court on January 13, 1943. If possible I shall endeavor to contact Mr. Connolly's attorney and discuss this [262] matter with him because he has also written me about it.

With kindest personal wishes, I remain

Sincerely yours,

ROY F. ALLAN.

Assistant U. S. Attorney.

RFA:J

(Testimony of Brian Connolly.)

Copy sent:

E. J. McCABE

Attorney at Law,
Liberty Theatre Building,
Great Falls, Montana.

Q. This defendants exhibit ten after you received it from me, did you take it up or discuss the contents of it with Mr. McBride?

A. I was up there. I told him I would rather leave it up to the Judge to decide it.

Q. Did you show Mr. McBride the copy of this letter and tell him that you received it from me?

A. Yes, sir.

Q. And you discussed this letter with him?

A. Yes.

Q. And did he say that he had sent that letter to Mr. Allan, did he tell you he had written Mr. Allan this letter?

A. I believe it is the one he said he would write to him at the time, and I showed it to him afterwards.

Q. He said that he was going to write that letter, and he said that was the letter he wrote?

A. He promised to send a letter before that, so I showed him, I did not know, and he promised to write a letter after that.

Q. And you showed him this letter, defendants exhibit [263] ten, and he said he wrote Mr. Allan, and that was the letter he wrote Mr. Allan?

(Testimony of Brian Connolly.)

A. Yes.

Q. Did he say that was the letter he wrote to Mr. Allan, just say yes or no? A. Yes, sir.

Mr. McCabe. We offer in evidence defendants exhibit number ten.

Mr. Allan: No objections.

The Court: It may be received in evidence.

Whereupon defendants exhibit number ten was received in evidence without objections, and is in words and figures as follows, to-wit:

DEFENDANTS EXHIBIT No. 10

Blackfeet Ind. Agency

Browning, Montana

April 22, 1943.

Mr. Roy F. Allan

Assistant U. S. Attorney

Billings, Montana.

Re: United States vs. Brian Connolly

Dear Mr. Allan:

Reference is made to our letter of January 9, 1943, to your reply of January 12, 1943, and our conversation with you in Great Falls in regard to the issuing of a grazing permit to Mr. Connolly covering certain land which is at this time included in the area covered by the temporary court injunction.

Since our conversation with you, we have contacted Mr. E. J. McCabe of Great Falls and Mr. Connolly in regard to this matter. It appears to

(Testimony of Brian Connolly.)

us [264] that Mr. McCabe in particular, and possibly Mr. Connolly, are already to arbitrate the entire trespass case. With this in mind, this office would be agreeable to a modification of the injunction whereby Section 3, Twp. 34 N., Range 9 W. would be excluded provided that Mr. Connolly and his attorney are agreeable to make a satisfactory settlement of the entire case and that the injunction covering the Section 3 be enforced until such a time as a grazing contract may be issued to Mr. Connolly thereon.

The modification of the injunction is agreeable to us under the foregoing recommendations, because we have always been ready and willing to cooperate with Mr. Connolly in this matter. However, if Mr. Connolly in turn is not ready to cooperate with us to the extent of closing this case without further court litigation, then we see no reason why the injunction should be modified in any way at this time.

Kindly feel free to contact Mr. McCabe in regard to this matter, and any agreeable proposition that you may work out with him will be satisfactory with this office.

Very truly yours,

F. H. McBRIDE

Superintendent.

1E. 1/1A. 30

cc. MR. E. J. McCABE

cc: MR. THOMAS L. CARTER,

Regional Forester.

(Testimony of Brian Connolly.)

Q. This morning Mr. Stephenson testified that he had a conversation with you at one time wherein you substantially notified him, or informed him that you could drive your livestock any place you wanted to on [265] the Reservation. Do you recall him so testifying this morning? A. I do.

Q. Did you make that statement to Mr. Stephenson at any time?

A. I didn't make any part of that.

Q. What was the statement you made to him at that time?

A. That we had a right to run for our own family where there is no fence.

Q. Did you make any complaint as to stock that was accidentally strayed off the Unit on the adjoining lands, or what did you say at that time?

A. I tried to explain to him about it, it couldn't be helped to keep them off; it was impossible to keep them off.

Q. That was the substance of your statement?

A. Yes.

Q. Mr. Connolly, how long have you lived upon the Blackfeet Indian Reservation?

A. About forty years.

Q. And during the time that you have been there residing and leasing these various units upon which you range your stock, do you know whether or not it has been the practice of residents of the Reservation to permit their stock to run at large?

Mr. Allan: We object to this. There is no such thing as custom. The Reservation is governed by

(Testimony of Brian Connolly.)

regulations by the Secretary of the Interior and Indian Affairs. It has nothing to do with this [266] case whatsoever.

Mr. McCabe: This is foundational to show that along the line of this testimony which I am seeking to elicit, that the Blackfoot Tribal Business Council, pursuant to authority conferred upon that Council by the Constitution and by-laws, and by the Charter, Corporate Charter of that Tribe, to adopt ordinances relative to the rights of the Indians on the Reservation, and that pursuant to that authority that the Council enacted into a law, that in order to constitute an offense, or render one Indian liable of the Reservation for trespassing stock, that the units must be fenced, or the land must be fenced, and that under the resolution and by-laws so adopted and approved by the Secretary of the Interior, it is expressly recited in his approval that any provisions, or regulations in his Department in conflict with any provision adopted under the constitution and by-laws, were not in effect. In other words, the Secretary by his official act, or approval, all rules and regulations heretofore promulgated by the Interior Department, or by the office of Indian Affairs, so far as they may be incompatible with any of the provisions of this said constitution and by-laws are hereby declared inapplicable to the Blackfeet Tribe Reservation.

Mr. Allan: I am merely objecting as to custom. We think that is the best evidence, if there is any

(Testimony of Brian Connolly.)

such regulation that has been approved by the Secretary. I am merely objecting to custom.

The Court: Suppose you can introduce your [267] rules and regulations, and it will then be a matter of law, whether it will have its effect or not.

Mr. McCabe: Supplementing that, the purpose is to show that the Department itself has construed these various regulations and leases has no application to the Indians on that Reservation. They acquiesced in it through these years up to the present time, and permitted stock to run at large as against property that was not fenced. In other words, that it is a practical construction of their own regulations by an Executive of the Department of the Government.

Mr. Allan: I don't have any such regulation.

Mr. McCabe: I will later introduce these various written documents, and then supplement it by the oral testimony. Possibly I am going at it the wrong way.

The Court: You might show perhaps, subject to the objections that the United States Attorney makes that it has been the custom that cattle and horses promulgaed where the land is unfenced.

Q. Mr. Connolly, do you know whether—

The Court: The testimony so far is that these Units are all fenced, that is, on the part of the Government.

Mr. McCabe: I understand that it is only as to unfenced Units.

(Testimony of Brian Connolly.)

Q. Do you know whether or not there has been a custom among the Blackfeet Indians on the Blackfeet Reservation relative to running their stock at large on that Reservation?

Mr. Allan: Again renewing the objection. We object to any testimony as to custom because the matter [268] is now covered by regulations.

The Court: I don't think that is an issue here. I think we threshed that out on your motion to strike.

Mr. Allan: Yes, on my motion to strike.

The Court: If you are standing upon this regulation of the Council promulgated and approved by the Secretary of the Interior—

Mr. McCabe: Yes.

The Court: You can inquire along that line whether they have been following that regulation, but not asking as to any custom.

Mr. McCabe: Then I will introduce that evidence through the Secretary of the Tribal Council because it is all a matter of written record and minutes. No use taking up the time of the Court with this now.

Cross Examination

By Mr. Allan:

Q. You are a Blackfeet Ward of the Government, an Indian? A. Yes sir.

Q. I believe that you are also a member of this present Tribal Council of the Blackfeet Indians?

A. Yes sir.

(Testimony of Brian Connolly.)

Q. The Tribal Council of the Blackfeet Indians had a resolution drawn a short while ago providing that there be no free grazing on its Tribal lands, on the Blackfeet Indian Reservation, did it not?

A. No sir.

Q. Are you familiar with Resolution number thirty-five [269] of the Blackfeet Indian Tribe?

A. Yes, I believe I am.

Q. What does that Resolution provide?

A. I haven't got it. If you can find it Mr. Allan. It should be there.

Mr. McCabe: I don't seem to have that Resolution.

A. There are some Resolutions there. If the Court will let me, I will show him the Resolution.

The Court: All right, Mr. Connolly, you can go and we will take a recess so that you can find it.

Whereupon a recess was had.

After Recess

Whereupon Brian Connolly was recalled for further cross examination by Mr. Allan.

Q. Directing your attention to Plaintiff's exhibit number eleven, I will ask you if you can recognize that, Mr. Connolly?

A. Yes, I recognize that.

Q. Is that Resolution number thirty-five of the Blackfeet Tribal Council adopted in Assembly on November 2, 1939?

A. Yes.

(Testimony of Brian Connolly.)

Mr. Allan: We now offer Plaintiffs Exhibit No. 11 in evidence.

Mr. McCabe: No objections.

The Court: It may be received.

Whereupon Plaintiff's Exhibit No. 11 was received in evidence without objection, and is in words and figures as follows, to-wit: [270]

PLAINTIFF'S EXHIBIT No. 11

Resolution No. 35

Resolution Adopted by the Blackfeet Tribal
Business Council in Regular Session
Assembled November 2, 1939.

Whereas, all grazing permits and leases on the Blackfeet Indian Reservation expire April 30, 1940, and it is necessary to draft new regulations and approve same.

Therefore, Be It Resolved, by the Blackfeet Tribal Business Council, in regular session assembled, a quorum being present, that it is the expressed wish of the Blackfeet Tribal Business Council that in the granting of grazing privileges on the Blackfeet Indian Reservation that preference shall be granted in the following order:

(1) Members of the tribe shall in all cases receive preference in accordance with the regulations.

(2) Stockmen who have established a residence on the reservation, who have local plants and who are tax payers of Glacier and Pondera counties.

(Testimony of Brian Connolly.)

(3) Bonafide residents of the State of Montana.

(4) After preferences have been taken care of in the above order, consideration then shall be given to those who are non-residents of the State of Montana.

Be It further Ordered, that

(a) In the allocation of range units to Indian permittees. it is with the provision that the minimum rental stipulated in the "Powers of Attorney" be paid the Indian allottee.

(b) The class or classes of livestock which will be allowed to graze on each range unit shall be left to the discretion of the Forestry Department of the Blackfeet [271] Agency.

(c) The average minimum rate per acre which shall be charged for tribal lands and recommended to the allottees for their lands shall be fifteen cents (15c) per acre.

(d) The number of years for which grazing privileges are to be authorized under both allocation and advertisement shall be three (3) years.

(e) Free grazing privileges on the Blackfeet Reservation are abolished.

(f) Indians shall be granted the privilege of meeting the high bid on ranges for which they compete.

(g) The previous permittee is given the privilege of meeting the high bid on a given unit in the order of preference as given above, but he shall not have prefereneec over Indian permittees.

(Testimony of Brian Connolly.)

It Is Further Ordered that bond requirements for Indian lessees be waived but that a six-month advance payment of rentals will be required.

That it is the policy of this jurisdiction to require ten percent deposit at the time allocations are made. Should the Indian permittee fail to complete a grazing permit on the unit, the ten percent deposit will be forfeited and paid to the allottees. Upon completion of the grazing permit, the said ten percent deposit shall be applied on the grazing fees.

It is agreed to allow Indians to run livestock in numbers not exceeding 500 head of cattle or 2500 head of sheep without comeptitive bidding and any Indian who wishes to run more than 500 head of cattle or 2500 head [272] of sheep will be required to secure the range through competitive bidding.

It is agreed that Indian permittees shall be given the privilege of running twice the amount of stock that is actually owned and any stock in excess of the amount actually owned by the Indian operator will require the furnishing of a regular bond as evidence of good faity.

All lambs born before April first of each year shall be considered on the basis of two lambs to one sheep.

It Is Further Agreed that the advertisement for the Sale of Grazing Privileges within the Blackfeet

(Testimony of Brian Connolly.)

Reservation as submitted to this Council for their approval be approved.

BLACKFEET TRIBAL BUSINESS COUNCIL

By STEWART HAZLETT

Chairman

By MAE A. WILLIAMSON

Secretary.

This Is to Certify that the foregoing resolution was adopted by the Blackfeet Tribal Business Council of the Blackfeet Tribe of Indians at a regular meeting of said Council held this second day of November, 1939.

MAE A. WILLIAMSON

Secretary.

I Certify that this is a true and correct copy of Resolution No. 35 adopted by the Blackfeet Tribal Business Council on November 2, 1939. Like copies are in the official files of the Agency Office, the Indian Office and the Blackfeet Tribal Business Council Office.

A. D. STEPHENSON

Forest Supervisor [273]

Q. Now, directing your attention to paragraph (e) in parenthesis down there, just to refresh your recollection, I will ask you what that paragraph states?

A. Free grazing permit privileges on the Blackfeet Reservation are abolished.

(Testimony of Brian Connolly.)

Q. In other words, there were no free grazing privileges on the Blackfeet Indian Reservation under that Resolution?

A. It wasn't passed by the Council that way.

Q. I am just asking the question, that is what that Resolution provides for?

A. It was not passed that way.

Q. That was the Resolution that was presented and passed? A. Yes sir.

Q. That was approved and passed?

A. Yes sir.

Q. Since that time I believe you have been instrumental in having that Resolution changed?

A. Yes sir.

Q. Have you a copy of the present Resolution?

A. Yes, it is right there.

Q. Can you tell us what the new Resolution provides. What was the change that was made?

A. The free grazing privilege is out in the new one.

Q. And that sentence is left out?

A. Yes sir.

Q. And that was changed at your instigation, was it not? A. Yes.

Q. And when did you have that changed as a member of [274] the Tribal Council?

A. Oh, I believe it was either the fifth or sixth of November.

Q. Of last year, 1942?

A. I haven't my minutes with me.

Mr. McCabe: You have them there in your hand, haven't you?

(Testimony of Brian Connolly.)

A. No sir, they are talking about something else.

Q. It was in November, 1942?

A. It was changed, yes.

Q. And the change made in November 1942. Is that correct?

A. As far as I can remember it was made. There was a change made some time.

Q. Now, in relation to crossing permits, I believe you testified on direct examination that there was nothing that provided for crossing privileges. Is that correct? A. Yes sir.

Q. Now, I will just direct your attention to paragraph four of Plaintiff's Exhibit number one, so as to enable you to refresh your recollection?

A. I don't know that I have seen this before.

Q. That is part of the grazing permit that you have, is it not? A. Yes sir.

Q. The part that you signed?

A. I didn't read it all.

Q. That has been a regulation of the Indian Department for years, and it provides for "livestock will not,— [275] livestock shall not be driven upon or across any Reservation without first procuring a standard form crossing permit number 5-929 properly signed by an authorized official of the Indian Service. This permit will state the number of head, dates of travel, class of stock, trail to be used, and destination. Such stock must be moved not less than five miles in case of sheep and ten miles in case of cattle each day, and stock shall not

(Testimony of Brian Connolly.)

remain more than twelve hours at any bed grounds or camping place. In case of unnecessary delay, or willful trespass, the Superintendent or his authorized agent shall assess and collect such damages as may seem reasonable. Owners of stock will anticipate their time of entry and secure a permit well in advance of the date when the stock will enter upon the Reservation. All stock will be refused entry upon the Reservation until a permit to enter has been issued. The Agency Office and the Officer in charge must be notified at least five days in advance in order that arrangements may be made for an Official to meet the stock."

A. The difference was mine was already on the Reservation.

Q. That applies also to the Reservation, does it not?

A. Into the Reservation, you stated.

Q. We will let the Court interpret that, Mr. Connolly?

A. Certainly.

Q. At the time this action was brought you had been notified by Mr. Graves, who was then Superintendent, that your cattle had trespassed, had you not? [276]

A. Yes sir.

Q. And you had been notified by Mr. Stephenson here, the Forestry and Grazing man on your Reservation to that effect, had you not?

A. It was by Mr. Wershing.

Q. He was Mr. Stephenson's predecessor, wasn't he?

A. Yes.

(Testimony of Brian Connolly.)

Q. And your attitude at that time was that you had a right to run your cattle any place in your vicinity as you say?

A. If there was no fence.

Q. In other words, you refused to comply with the order and regulations of the Indian Department?

A. I did not.

Q. And you attempted to have rules and regulations passed by the Tribal Council to provide for your stray cattle?

A. I did not.

Q. As a matter of fact you brought rules and regulations into this Court the first time that the case came up, and tried to put them in evidence, did you not?

A. We had rules and regulations, but I don't know whether I wanted to put them in evidence.

Q. But those were not rules and regulations that had been approved by the Secretary of the Interior, were they?

A. That was approved by the Secretary of the Interior.

Q. They were not allowed in evidence for that reason?

A. I don't believe it ever come up, that question at all. [277]

Q. In other words, your attitude was one of defiance, that you would run your cattle wherever you wanted to?

A. No sir.

Q. You have changed your mind since that time?

A. I have not changed my mind at all. I am still of that opinion.

(Testimony of Brian Connolly.)

Q. Are you familiar enough with this map to point out the home place on it, and also part of unit twelve?

A. It is the present permit one hundred eighty-five.

Q. And that is indicated by this small oblong, approximately in the center of the map, exhibit two?

A. No, it is more than that. They have not got it all in there.

Q. What is the rest of it. One hundred sixty-five, is that covered too?

A. All of this here, yes, (Indicating), and there is some bad stuff in there.

Q. That is known as one hundred and eighty-five, the additional stuff?

A. It is known as one hundred and eighty-five at the present time, yes.

Q. Just point out exactly where that one hundred and eighty-five is. That is the part that is marked 185. It is right alongside of the part marked 185?

A. It runs south to the railroad.

Q. And it runs south to the railroad?

A. Yes.

Q. Where was your unit twelve?

A. Right there. (Indicating).

Q. As shown by twelve, marked on plaintiff's exhibit [278] number two?

A. Yes sir.

Q. Can you give us the approximate distance between unit one hundred eighty-five and unit twelve?

(Testimony of Brian Connolly.)

A. By car it is always eleven miles.

Q. By the road that the car travels?

A. Yes sir.

Q. Did you have any right to grazing between twelve and one hundred and eighty-five in that eleven miles? A. Yes.

Q. What were those rights based on?

A. Based on a lease on Cut Bank Creek.

Q. Where are those leases?

A. I can name off the ones that we got them from.

Q. I want to see the leases, the actual leases?

A. They went in evidence here this morning already. I don't know the numbers of them.

Q. How much did those leases cover?

A. There was around about two thousand acres.

Q. On Cut Bank Creek?

A. On Cut Bank Creek and north of the river.

Q. That refers to F. G. Farm and Grazing lease 3437? A. Yes.

Q. That is three hundred and forty acres. Is that correct? A. That is some of it, yes.

Q. And then the other, Farm and Grazing Lease number 445 covering two hundred and forty acres. Isn't that correct?

A. It probably is, yes sir. [279]

Q. Other than that, is there any land in there you have leased through the Indian Office?

A. I have leased it through the Indian Office, with their consent.

Q. What is the other land?

(Testimony of Brian Connolly.)

A. The ones that you turned down this morning, that you would not admit in evidence.

A. I mean the two that we have, the two that you have, that we are taking into consideration?

A. There is still another one in there that you don't mention.

Q. Was that approved by the Indian Office?

A. Yes sir.

Q. What section is that. What lease is that?

A. It ain't there. The fellow that owned it notified the Indian Office that he is going to handle it himself.

Q. Is he an Indian? A. Yes.

Q. And a Ward of the Government of the United States? A. Yes.

Q. But you have not the approval of the Indian Department on that lease?

A. We have it, yes.

Q. I thought you just told us the fellow that owned it notified the Indian Department he would handle it himself?

A. Yes, and they approved it.

Q. When was,— And they approved it?

A. Yes.

Q. When was that lease issued? [280]

A. We drew it up before a Notary in the town of Browning.

Q. When was that?

A. It should be on the date of the lease.

Mr. McCabe: What was the lease?

A. Joe Kipp and Jack Kipp.

Mr. McCabe: And which one is this?

(Testimony of Brian Connolly.)

A. Both of them, but you haven't got both of them, but you have the check over there.

Mr. McCabe: You paid for it, didn't you?

A. Yes, we have canceled checks for all of them.

Mr. Allan: Q. As I understand it, this Kipp lease you are talking about, is the one that has not gone through the Agency?

A. It has not gone through, outside of the Agency with their approval.

Q. There is no evidence on the lease that it was approved by the Agency?

A. No, just orally.

Q. Now, in this area of eleven miles between your unit twelve and your home unit one hundred and eighty-five, as I understand *to* it, in accordance with the Agency records, there is seven hundred and ten acres of land that you have a right to graze there?

A. In one eighty-five.

Q. Between those two places?

A. There is more than that.

Q. Well, this four hundred and seventy acres, one farming and grazing lease, and two hundred and forty in the other?

A. What you mean that was approved by the Indian Office? [281]

Q. Yes.

A. It probably is, yes, by a lease.

Q. Now, Mr. Connolly, after this action was started in 1941, you continued to graze your cattle any place that you saw fit, did you not?

(Testimony of Brian Connolly.)

A. No sir.

Q. Wasn't it necessary for the Government to cite you for contempt of court in January 1940, after the temporary restraining order was placed upon you?

A. I was not home when they got on there, and they knew I was not on there.

Q. We had a hearing before this Court, and you were found guilty of contempt of court?

A. Yes sir.

Q. And you were fined fifty dollars?

A. Yes sir.

Q. Now, the Ornstad cattle that you spoke about being in trespass on these various lands, the Ornstad cattle were kept under fence, were they not?

A. No sir.

Q. As to Mrs. Perrin's cattle, how many head does she have?

A. She should have around one hundred head, yearlings.

Q. I mean at the time of this action in 1941?

A. She had one hundred head at that time.

Q. Is she an Indian woman? A. Yes.

Q. Widow woman? A. Yes.

Q. Do you know what, if any, arrangement had been [282] made for her to run her cattle on Unit twenty-two and twenty-three?

A. There never has been.

Q. Do you know?

A. I do know.

(Testimony of Brian Connolly.)

Q. What arrangement had been made to run them there?

A. There has been since but not then, she didn't have any lease; she had no lease.

Q. Now, Fred Lewis, his cattle run under a fenced unit likewise, didn't they?

A. Yes sir.

Q. And at the time that you saw them in trespass was that after a storm, when a few of them got back? A. Before and after.

Q. Mr. Lewis makes it his policy to keep his cattle on his own unit, does he not?

A. Just like I do.

Q. You turn your cattle loose about your home place, and let them go between that and Unit twelve, do you not? A. No, I do not.

Q. In other words, you felt that you were an Indian and a member of the Tribal Council, and you could just about defy the Government and fix your own regulations up there?

A. No sir.

Q. You have changed your mind now?

A. I have never changed it. [283]

Redirect Examination

By Mr. McCabe:

Q. On cross examination you testified that there was a lease on Cut Bank Creek which you had paid for and had taken from certain persons with the consent of the Indian Office at Browning?

A. Yes sir.

Q. And did you pay for those? A. I did.

(Testimony of Brian Connolly.)

Q. I will show you a number of checks. Showing you defendants proposed exhibits number twelve, thirteen, fourteen and fifteen, please state if that is your signature appearing thereof?

A. Yes.

Mr. Allan: May I just inquire, did these checks go through the Indian Agency in relation to the matters about which you are talking Mr. Connolly?

A. Well, I don't think so. They gave their approval.

Mr. Allan: Q. Were they in relation with Indian land?

A. They gave me the approval. They notified the Indian office that they were going to handle them themselves.

Q. Have you any particular lease to show that?

A. There it is, right there.

Mr. McCabe: Q. Now, these exhibits, are those the checks that were given in payment of the land to which you testified on cross examination that you had secured on Cut Bank Creek?

A. Yes sir. [284]

Q. And are those the respective signatures of the respective payees appearing thereon, and endorsed on the back? A. Yes.

Q. And were these checks presented and paid by your bank? A. Yes.

Q. On which they were drawn?

A. Yes sir.

Mr. Allan: I notice there is a check here which

(Testimony of Brian Connolly.)

is marked defendants exhibit fifteen, February 19, 1941, in the amount of eighty-four dollars. What was that for, please?

A. Let me see it please. It states right here on the check one-half payment on leases.

Mr. Allan: One-half payment on lease?

A. Yes sir.

Q. How much land was there?

A. I believe there was eleven hundred and twenty acres.

Mr. Allan: Q. And what period of time was that land being leased for by you?

A. For a year.

Mr. Allan: That was the one-half payment on that amount of land? A. Yes sir.

Mr. Allan: Q. Did you figure that was a reasonable value to pay for the grazing on that land?

A. That is what he asked me for it.

Mr. Allan: Q. Did you feel that that was a reasonable value yourself? [285]

A. Certainly.

Mr. Allan: Q. Now, directing your attention to defendants exhibit number twelve, I will ask you if you can identify what that was given for?

A. That is to Joe Kipp's wife. It states here, for lease on eleven hundred and twenty acres.

Mr. Allan: Q. How long a period of time was that for? A. For a year.

Mr. Allan: Q. How much was the amount of that check? A. Five dollars.

(Testimony of Brian Connolly.)

Mr. Allan: Q. Was that a partial payment, or what? A. It is a partial payment.

Mr. Allan: Q. Do you feel that that was a reasonable amount to be paid?

A. It was for fifteen cents an acre.

Q. Directing your attention to defendants exhibit number thirteen, I will ask you what that was?

A. That was for a lease on seventy acres of Jack Kipp's land.

Mr. Allan: Q. And for what period of time was that for? A. For a year.

Mr. Allan: Q. And how much was that check?

A. That is for ten dollars and seventy cents.

Mr. Allan: Q. And was that in partial payment on this same land that you are talking about?

A. No, it is different land. [286]

Mr. Allan: Q. How many acres did that cover?

A. That covered seventy acres.

Mr. Allan: Q. How much per acre?

A. Fifteen cents an acre.

Mr. Allan: Q. Directing your attention to exhibit number fourteen, I will ask you to tell us what that was?

A. That is paid to Mr. Joe Kipp, fifty-nine dollars and no cents, and paid in full for lease, eleven hundred and twenty acres.

Mr. Allan: Q. Were all these checks taken for the same land that you have testified to here?

A. This eleven hundred and twenty acres.

Mr. Allan: Q. For the same period of time?

A. For a year, yes sir.

(Testimony of Brian Connolly.)

Mr. Allan: Q. And you felt that was a reasonable amount that you paid for the land during that time?

A. I paid what they asked for it.

Mr. Allan: Q. And that is what was given?

A. Yes sir.

Mr. Allan: Q. Now, was this lease that you had with the approval of the Superintendent of the Agency?

A. Yes, and Mr. Wershing too.

Mr. Allan: Q. Have you any record to show that, to show the approval?

A. That is by word of mouth, Joe Kipp and I was there, and he was there, and he told him.

Mr. Allan: Q. You had no written approval though by the Agency? [287]

A. I wish he were here, he said it was all right with him.

Mr. Allan: We are going to have to object again because his testimony shows that it was not with the approval of the Agency. Even the President of the United States cannot lease Indian land, because he can not do so in accordance with the statutes.

Mr. McCabe: Q. Now, do I understand that all of these checks relate to the same group of land, eleven hundred and twenty acres and seventy acres, or eleven hundred and ninety acres all together?

A. They are two different pieces of land.

Q. What was the total acreage that was paid for by these checks?

(Testimony of Brian Connolly.)

A. That would be eleven hundred and ninety acres.

Mr. McCabe: We now offer in evidence defendants exhibits twelve, thirteen, fourteen and fifteen.

Mr. Allan: Objected to for the reasons heretofore stated.

The Court: The objection is good, but I will receive them, and consider them later, subject to your objection.

Whereupon defendants exhibits number twelve, thirteen, fourteen and fifteen were received in evidence and are in words and figures as follows:

DEFENDANTS' EXHIBIT No. 12

THE FIRST NATIONAL BANK 93-374

Browning, Montana, June 10, 1941

Pay to the order of Isabell Cook Kipp\$25.00/100
Twenty-five 00/100 Dollars

BRIAN CONNOLLY

For Lease 1120 acres

The First National Bank

PAID

Jun 10 1941

Browning, Montana

Endorsed: Isabell Cook Kipp.

(Testimony of Brian Connolly.)

DEFENDANTS' EXHIBIT No. 13

THE FIRST NATIONAL BANK 93-374

Browning, Mont. Mar. 11 1942

Pay to the Order of Mrs. Genevieve Walter.....\$10.70/100
Ten 70/100 Dollars

BRIAN CONNOLLY

For Lease on 70 acres of estate

The First National Bank

PAID

Mar 13 1942

Browning, Montana

Endorsed: Genevieve Walter

Pay to the order of The First National Bank, Browning,
Montana. Blackfeet Trading Post.

DEFENDANTS' EXHIBIT No. 14

THE FIRST NATIONAL BANK 93-374

Browning, Mont., June 23, 1941

Pay to the Order of Mrs. Joe Kipp\$59.00
Fifty-nine 00/100 Dollars

BRIAN CONNOLLY

For: Paid in full for lease 1120 acres

The First National Bank

Paid Jun 23 1941

Browning, Montana

Endorsed: Mrs. Joe Kipp.

(Testimony of Brian Connolly.)

DEFENDANTS' EXHIBIT No. 15

THE FIRST NATIONAL BANK 93-374

Browning, Mont., Feb. 19, 1941

Pay to the Order of Joe Kipp #2\$84.00
Eighty-four and no/ Dollars.

Half Payment Lease

BRIAN CONNOLLY

The First National Bank

PAID

Feb. 19 1941

Endorsed: Joe Kipp #2.

Q. Now, on cross examination reference was made to a letter from Mr. Graves, stating that your stock was trespassing on August 4, 1941. Please examine defendants exhibit sixteen, and see if that is the letter? A. Yes sir.

Q. And that is the letter that you were examined or questioned about by counsel for the government?

A. Yes sir.

Q. And after you received this letter did you go out and remove any of the stock that was described in that, from out of the other range back on your own range?

A. We did as soon as we got home.

Mr. McCabe: We offer that in evidence.

Mr. Allan: No objection.

The Court: It may be received.

Whereupon defendants exhibit number six-

(Testimony of Brian Connolly.)

teen was received in evidence without objection, and is in words and figures as follows, to-wit:

DEFENDANTS EXHIBIT No. 16

United States
Department of the Interior
Office of Indian Affairs
Field Service [290]
Blackfeet Agency,
Browning, Montana,
August 4, 1941

Brian Connelly,
Browning, Montana.

Dear Sir:

Recently a band of your horses were seen trespassing on Unit #33. There were 65 head in this bunch and many of them were branded ^P_^ on the left jaw which identifies them as your property.

This problem of trespassing horses on this reservation has gone on long enough and steps are being taken to notify the various trespassers and more drastic measures will be taken in the very near future.

On this same trip cows carrying your brand ^P_^ were seen along the road in Unit #22 which is not where they belong and it would be appreciated if you would take some immediate steps to see that this matter is taken care of.

Yours truly,
C. L. GRAVES, St.

(Testimony of Brian Connolly.)

Q. Now, you have been examined on cross examination about a resolution relative to free grazing on the Blackfeet Indian Reservation. Will you please state whether or not that resolution, whether it passed or not, has been a subject of discussion with the Blackfeet Tribal Council?

A. Yes sir.

Mr. Allan: We object to such resolution. The resolution speaks for itself, and it is the best evidence. [291]

The Court: Well, I think so. The resolution was passed first, and was revoked.

Mr. McCabe: We are going to show there was a dispute with some members of the Council; it was never adopted, and some said it was, and in order to obviate that question there was a resolution introduced repealing that resolution.

The Court: Objection sustained as the matter is going into the proceedings of the Council.

Recross Examination

By Mr. Allan:

Q. This Kipp land is about the same type of land as section twenty-three, twenty-four, twenty-five, twenty six, twenty-seven and thirty-four and thirty-five, township thirty-five north, range ten west, Montana Principal Meridian, and also sections three and ten of township thirty-four north of range nine west. It is all about the same type of grazing land, is it not? A. Some of it is.

Q. But under the general heading?

A. Yes.

Witness excused.

Whereupon

DANIEL CONNOLLY

a witness called and sworn on behalf of the defendants, testified as follows:

Direct Examination

By Mr. McCabe:

Q. What is your name? A. Dan Connolly.

Q. Daniel Connolly? [292]

A. Daniel Connolly or Dan Connolly.

Q. Are you a son of Brian Connolly?

A. Yes sir.

Q. In the year 1941 did you have any duties or do any work in connection with cattle owned by Brian Connolly upon the Blackfeet Reservation?

A. Yes sir.

Q. Do you know where the location of the land is, that is known as range Unit number twelve, on which your father had a lease from the Indian Department?

A. No, I don't. I was only told about the leases, only where the lines was. I herded them cattle in there.

Q. Do you know where the Milk River range is that your Dad has? A. Yes.

Q. Have you ridden that range?

A. Yes sir.

Q. And had your father told you to herd that range, or ride that range looking for cattle?

A. Yes sir.

Q. And what were his instructions to you relative

(Testimony of Daniel Connolly.)

to turning back any cattle that you would find off of his range, back on the range?

A. He told me to fetch them back on our range.

Q. Did he also instruct you not to drive any of your cattle off of his range on to other ranges?

A. Yes, he did.

Q. And during 1941, were you employed in your work at various times during the summer and fall.

A. I was there in the spring and in the fall. 293]

Q. And at the time that you were there in the fall were any of your brothers there at the place known as the Milk River range? A. Yes sir.

Q. And which one of the brothers were there. Was there any of the boys there at the time you were there?

A. Yes, Eddie was there during the spring and in the fall, and Victor both, and Charlie too.

Q. Did any of the boys go to school along the early part of September? A. Yes sir.

Q. And then did you take over part of the work of riding and keeping the stock confined?

A. I did.

Q. Did your father show you the lands on which he claimed to have range rights?

A. Yes sir.

Q. And he pointed it out to you and showed it to you? A. Yes sir.

Q. And after that what would be your practice as to covering and riding that area every day, or not?

A. We would ride out and put all our cattle back on our range.

(Testimony of Daniel Connolly.)

Q. Each day? A. Yes.

Q. And when would you start out to do that, in the morning? A. In the morning.

Q. And that was the general practice every day?

A. Yes sir. [294]

Q. Well, while you were riding did you sometimes find some of your Father's stock, or your stock, had strayed over off of the range?

A. Oh, yes.

Q. What would you do?

A. Fetch them back, and put them on the range.

Q. Always while you were riding the territory on your father's range, designated as your father's range, did you see other livestock grazing in that area? A. Yes.

Q. And how many head would you see in groups?

A. I couldn't just say; some times it would be forty head; some times thirty head, and twenty-five head.

Q. Would that be on land surrounding your Father's land, or range land? A. Yes sir.

Q. And did you recognize any of the brands on the stock? A. Yes sir.

Q. Whose brands did you recognize?

A. Devereaux, Perrin's.

Q. Did you notice any Onstad and Lewis stock?

A. Yes.

Q. Is there anyone else that you can think of, that you saw their livestock on there?

A. Not right offhand, there was some there.

(Testimony of Daniel Connolly.)

Q. How many head would comprise these various groups concerning which you have testified?

A. Oh, there was different bunches, some times twenty-five or thirty head, or forty head. You never could tell how many you might run into. [295]

Q. All the way from twenty-five head to forty head?

A. Yes sir.

Q. Did your brothers sometimes ride with you while you were doing this work?

A. Yes, sir.

Q. How far would you find that your Father's cattle, or some of yours, would stray off the range before you would locate them in the different directions?

A. Well, five or six miles.

Q. In different directions?

A. Yes.

Q. Do I understand you to say that you had ridden in directions five or six miles each way from your Father's range?

A. Yes sir.

Q. And are there any fences around there within that area, five or six miles?

A. Yes, there is.

Q. And what place is fenced?

A. There is the old Rim ranch. I don't know, I think Speer has got it.

Q. About how many acres are you able to say is under fence there?

A. I do not know how much really is under fence. There is quite a little bit of farming land.

Q. Is it cultivated land?

A. Yes sir.

Q. I mean is there any fence around the range and grazing land out in that country?

(Testimony of Daniel Connolly.)

A. Yes, there is a sheep outfit, his name is Williamson. [296] He has a lease fenced in there.

Q. How much land is enclosed under that fence, would you say approximately?

A. I do not know how much there is.

Q. Well, are those the only two fences up in that country? A. Yes sir.

Q. Within a distance of five or six miles from your Father's place? A. Yes sir.

Q. Would you say there is a thousand acres that is fenced? A. Yes, I believe so.

Q. Would you say that it is two thousand acres that is fenced?

A. Well, I wouldn't say, but I would say it is a thousand or more, it may be more than that. I couldn't say.

Q. You would not estimate it?

A. No sir.

Q. But, is there lots of open country around your Father's range that is not fenced?

A. Yes sir.

Q. And how far in each direction does that open country extend?

A. Well, it is about twenty miles.

Q. You can go east for about twenty miles,—about thirty miles east? A. Yes sir.

Q. And how far west? [297]

A. Twenty miles.

Q. And how far north?

A. Well, about six miles I would judge, or five miles.

(Testimony of Daniel Connolly.)

Q. And how far south?

A. I would say it is seven miles.

Q. To the next fencing on the south?

A. Yes sir.

Cross Examination

By Mr. Allan:

Q. Do you know where Buffalo Lake is?

A. Yes sir.

Q. Is there a fence around there?

A. Not around Buffalo Lake, no sir.

Q. There is a fence there, isn't there?

A. Yes sir.

Q. That is in addition to the fence you have testified to?

A. Yes sir.

Q. How far is that from Unit twelve?

A. I don't know.

Q. About six miles?

A. I don't know where Unit twelve is.

Q. That is your Father's Unit, that is what your Father has. Your Father has the upper part, north part where he was grazing his cattle?

A. How far did you say it was?

Q. About six miles from there to Buffalo Lake?

A. It is farther than that, but it is fenced, that that I am talking about is likely to be closer.

Q. Are you familiar with Unit one hundred and twenty-nine? [298]

A. No, I ain't accustomed to these Units.

Q. Or Unit twenty-nine?

A. None of these Units.

Q. Are you familiar with Unit One hundred and eighteen?

A. No sir.

(Testimony of Daniel Connolly.)

Q. Which is about twelve miles west?

A. No, I ain't.

Q. You don't know whether those units are fenced or not?

A. I don't know of any unit, no.

Q. You likewise had horses of your own running with your Father's stock, did you not?

A. Yes sir.

Q. What is your brand? A. A. X.

Q. Is that a regular A? A. Yes sir.

Q. With the X hanging from the A. Is that correct, underneath the A? A. Yes sir.

Q. How many head of horses do you have on the Reservation? A. About seven or eight head.

Q. Have you made any provisions for the grazing of those horses, or did you run them with your Fathers?

A. I run them with my Father's, and my Father has got the land.

Redirect Examination

By Mr. McCabe:

Q. Mr. Connolly, you say you don't recognize these Units by numbers? A. No sir.

Q. Are you acquainted with all the areas surrounding [299] your Father's range known as Unit twelve? A. Is that the north place?

Q. Yes, the north place? A. Yes.

Q. The Milk River place?

A. Yes, I am accustomed to that country, and I know it, yes.

Witness excused.

Whereupon

VICTOR CONNOLLY,

a witness called and sworn on behalf of the defendants, testified as follows:

Direct Examination

By Mr. McCabe:

Q. What is your name?

A. Victor Connolly.

Q. And are you a son of Brian Connolly sitting to my left? A. Yes.

Q. Do you know where the land is located that your Father runs his livestock on up on Milk River, known as the Milk River place? A. Yes.

Q. And who was living with you?

A. My brothers was.

Q. And what brothers?

A. Eddie and Charlie and Dan.

Q. Dan? A. Yes

Q. Did your Father have you do any work in connection [300] with any of the cattle he had grazing up there? A. Yes.

Q. And what was your work that he had you do, was it to help the other boys look after the cattle? A. Yes.

Q. And what did he tell you to do in connection with those cattle?

A. To bring them back on the range, on the lease.

Q. Did he tell you to keep looking for cattle, and if you found any away from the lease, to bring them back, put them back on? A. Yes.

(Testimony of Victor Connolly.)

Q. And how often would you ride around with your brothers doing that work?

A. Every morning.

Q. Every morning? A. Yes sir.

Q. About what time would you start out in the morning, if you remember, would it be early in the morning?

A. Yes, we would start out about eight o'clock.

Q. And how long would you work during the day on that work, and getting all the cattle, and turning them back on the lease?

A. We would work until noon. If it was not finished by noon we would go back and work in the afternoon.

Q. You would work as long as it took you to get all the cattle back on the range? A. Yes sir.

Q. Did your Father give you any instructions about keeping your cattle off of the adjoining range? [301] A. Yes sir.

Q. What did he tell you about that?

A. He told us to keep them off of other ranges.

Q. He told you to keep the cattle off of the other ranges? A. Yes sir.

Cross Examination

By Mr. Allan:

Q. Were you working for your Father during the fall of 1942? A. Up to September.

Q. Up to September? A. Yes sir.

Q. You don't know anything that went on after September?

(Testimony of Victor Connolly.)

Q. No, I would be home week ends. I would come home week ends.

Q. How old are you now? A. Thirteen.

Q. You were there just during the summer time?

A. Yes sir.

Redirect Examination

By Mr. McCabe:

Q. Would you come home on week ends?

A. Yes.

Q. And would you likewise work week ends in connection with the cattle? A. Yes sir.

Q. Now, is the place,—this place concerning which you have testified, what I call the Milk River place, also known as the Crown Butte place?

A. Yes sir. [302]

Q. They are one and the same place?

A. Yes sir.

Q. Do you know whether any of your family ever took,—do you know whether any of your family are upon these, any of these range units taking care of the cattle at the present time?

A. My brothers were.

Q. Which ones? A. Eddie and Charlie.

Q. And are they up there now?

A. Yes, they are up there now.

Q. When you left they were? A. Yes sir.

Witness excused.

Whereupon

BRIAN CONNOLLY

was recalled on behalf of the defendants, and testified as follows:

Direct Examination

By Mr. McCabe:

Q. Mr. Connolly, you testified this morning that Charlie and Eddie were helping in taking care of your cattle during the year 1941? A. Yes sir.

Q. And they have not come down here with you to attend the trial?

A. We had to leave them there to take care of the cattle.

Q. You had to leave them there?

A. Yes sir.

Q. Have you any other hired men other than your own [303] children? A. No sir.

Q. You let them take care of the cattle to keep them from trespassing on other land?

A. Yes sir.

Cross Examination

By Mr. Allan:

Q. You are trying to live up to these regulations, now are you not? A. I always have.

Witness excused.

Whereupon

LEO KENNERLY,

a witness called and sworn on behalf of the defendants, testified as follows:

Direct Examination

By Mr. McCabe:

Q. And what is your name?

A. Leo Kennerly.

Q. Where do you reside?

A. At Browning, Montana, on the Blackfeet Reservation.

Q. What position, if any, do you hold with the Blackfeet Indian Tribe?

A. I am the Secretary.

Q. And by Secretary, you mean Secretary of the Blackfeet Tribal Business Council?

A. That is it.

Q. And as such Secretary, do you have the records, official records and minutes of meetings of the Blackfeet Tribal Business Council? A. I do.

Q. And as such Secretary do you have in your custody [304] and control the constitution and by-laws for the Blackfeet Tribe of the Blackfeet Indian Reservation? A. I do.

Q. And do you also have as the Secretary, the Corporate Charter of the Blackfeet Tribe of Montana? A. Yes sir.

Q. On the Blackfeet Indian Reservation of Montana? A. Yes sir.

(Testimony of Leo Kennerly.)

Q. And have you those records with you at the present time? A. Yes sir.

Q. And likewise as such Secretary, do you have the custody of the Law and Order Codes of the Blackfeet Indian Reservation Tribe?

A. Yes sir.

Q. And have you that with you?

A. Yes sir.

Q. Now, will you turn to the Constitution and By-Laws of the Tribe. Have you that with you there? A. Yes sir.

Q. And is there a provision in the Constitution and By-Laws of the Blackfeet Tribe known as and identified in the Constitution and By-Laws as Paragraph K, of Section six on page four?

A. Yes sir.

Q. Of Article six of Section one, on page four?

A. Yes sir.

Q. I wish you would read it into the record?

The Court: Any objection to it?

Mr. Allen: No sir. [305]

Q. In order to get the evidence in, then you will have to read that. Just read that as one of the Powers of the Council.

Section K of Article seven, Powers of the Council: "To promulgate ordinances for the purpose of safe guarding the business and safety of residents of the Blackfeet Indian Reservation, and to establish minor courts for the adjudication of claims or disputes arising amongst the members of the Tribe, and for the trial and punishment of members of

(Testimony of Leo Kennerly.)

the Tribe charged with the commission of offenses set forth in such ordinances.”

Q. Mr. Kennerly, do you also have the approval of the Secretary of the Interior of the constitution and by-laws from which you have read?

A. Yes sir.

Mr. McCabe: We offer in evidence the approval clause of the Secretary of the Interior, Harold L. Ickes, of the constitution and by-laws, and I will ask the witness to read it.

Mr. Allan: No objections.

“I, Harold L. Ickes, the Secretary of the Interior of the United States of America by virtue of the authority granted me by the Act of June 18, 1934 (48 Stat. 984, as amended) do hereby approve the attached constitution and by-laws of the Blackfeet Tribe of the Blackfeet Reservation. All rules and regulations heretofore promulgated by the Interior Department, or by the Office of Indian Affairs, so far as they may be incompatible with any of the provisions of said [306] constitution or by-laws, are hereby declared inapplicable to the Blackfeet Tribe of the Blackfeet Reservation. All officers and employees of the Interior Department are ordered to abide by the provisions of the said constitution and by-laws. Approved, recommended, A. C. Monahan, Acting Commissioner of Indian Affairs. Signed by Harold L. Ickes, Secretary of the Interior, Washington, D. C., December 13, 1935.”

Q. Now, Mr. Kennerly, refer to the Corporate

(Testimony of Leo Kennerly.)

Charter of the Blackfeet Tribe, and state whether or not in that Charter under the Powers of the Tribe, there is a section identified as Section seven or paragraph seven on page four of the Charter?

A. Of corporate property?

Q. Of corporate property.

Mr. Allan: The only suggestion I have, why does not the counsel introduce the Corporate Charter and the Constitution and By-Laws.

The Court: You might just as well introduce them.

Mr. McCabe: We now offer in evidence defendants exhibit number seventeen, being a copy of the Corporate Charter of the Blackfeet Tribe of the Blackfeet Indian Reservation ratified August 15, 1936.

Mr. Allan: No objection.

The Court: Let it be received in evidence without objection.

Whereupon defendants exhibit seventeen was received in evidence without objections, and is in words and figures as follows, to-wit: [307]

DEFENDANTS EXHIBIT No. 17

Corporate Charter of the Blackfeet Tribe of the
Blackfeet Indian Reservation

A Federal Corporation Chartered Under the Act
of June 18, 1934.

Whereas, the Blackfeet Tribe of the Blackfeet Indian Reservation of Montana constitutes a recog-

(Testimony of Leo Kennerly.)

Defendants' Exhibit No. 17—(Continued)

nized Indian tribe organized under a Constitution and By-laws ratified by the Tribe on November 13, 1935, and approved by the Secretary of the Interior on December 13, 1935, pursuant to section 16 of the Act of June 18, 1934, (48 Stat. 984), as amended by the Act of June 15, 1935, (49 Stat. 378); and

Whereas, more than one-third of the adult members of the Tribe have petitioned that a charter of incorporation be granted to such Tribe, subject to ratification by a vote of the adult Indians living on the reservation.

Now, Therefore, I Harold L. Ickes, Secretary of the Interior, by virtue of the authority conferred upon me by the said Act of June 18, 1934, (48 Stat. 984), do hereby issue and submit this charter of incorporation to the Blackfeet Tribe of the Blackfeet Indian Reservation to be effective from and after such time as it may be ratified by a majority vote of the adult Indians living on the reservation.

Corporate Existence:

1. In order to further the economic development of the Blackfeet Tribe of the Blackfeet Indian Reservation in Montana by conferring upon the said Tribe certain corporate rights, powers, privileges and immunities; [308] to secure for the members of the Tribe an assured economic independence; and to provide for the proper exercise by the Tribe of various functions heretofore performed by the

(Testimony of Leo Kennerly.)

Defendants' Exhibit No. 17—(Continued)

Department of the Interior, the aforesaid Tribe is hereby chartered as a body politic and corporate of the United States of America, under the corporate name "The Blackfeet Tribe of the Blackfeet Indian Reservation."

Perpetual Succession:

2. The Blackfeet Tribe of the Blackfeet Indian Reservation shall, as a Federal corporation, have perpetual succession.

Membership:

3. The Blackfeet Tribe of the Blackfeet Indian Reservation shall be a membership corporation. Its members shall consist of all persons now or hereafter entitled to membership in the Tribe, as provided by its duly ratified and approved Constitution and By-laws.

Management:

4. The Blackfeet Tribal Business Council established in accordance with the said Constitution and By-laws of the Tribe, shall exercise all of the corporate powers hereinafter enumerated.

Corporate Powers:

5. The Tribe, subject to any restrictions contained in the Constitution and laws of the United States, or in the Constitution and By-laws of the said Tribe, shall have the following corporate powers, in addition to all powers already conferred or guaranteed by the Tribal Constitution and By-laws.

(a) To adopt, use, and alter at its pleasure a [309] corporate seal.

(Testimony of Leo Kennerly.)

Defendants' Exhibit No. 17—(Continued)

(b) To purchase, take by gift, bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, subject to the following limitations:

1. No sale or mortgage may be made by the Tribe of any land or interests in land, including water power sites, water rights, oil, gas, and other mineral rights now or hereafter held by the Tribe within the boundaries of the Blackfeet Reservation. No sale of any other capital assets of the Tribe exceeding in value the sum of \$10,000 may be made unless approved by a majority vote at a referendum called by the Tribal Council as provided in Article IX of the Constitution of the Tribe.

2. No leases or permits (which terms shall not include land assignments to members of the Tribe) or timber sale contracts covering any land or interests in land now or hereafter held by the Tribe within the boundaries of the Blackfeet Indian Reservation shall be made by the Tribe for a longer term than ten years, and all such leases, permits, or contracts must be approved by the Secretary of the Interior or by his duly authorized representative; but oil and gas leases, or any leases requiring substantial improvements of the land may be made for longer periods when authorized by law.

3. No action shall be taken by or in behalf of the Tribe which is in conflict with regulations authorized by section 6 of the Act June 18, 1934, or in any way operates to destroy or injure the tribal

(Testimony of Leo Kennerly.)

Defendants' Exhibit No. 17—(Continued)
grazing lands, timber, or other natural resources of the [310] Blackfeet Indian Reservation.

(c) To issue interests in corporate property in exchange for restricted Indian lands, as provided in Article VII, Section 6 of the Constitution of the Tribe.

(d) To borrow money from the Indian Credit Fund in accordance with the terms of Section 10 of the Act of June 18, 1934, (48 Stat. 984), or from any other Governmental agency, or from any member or association of members of the Tribe, and to use such funds directly for productive tribal enterprises, or to loan money thus borrowed to individual members or associations of members of the Tribe, provided that the amount of indebtedness to which the Tribe may subject itself shall not exceed one hundred thousand dollars, except with the express approval of the Secretary of the Interior.

(e) To engage in any business that will further the economic well being of the members of the Tribe or to undertake any activity of any nature whatever, not inconsistent with law or with any provisions of this charter.

(f) To make and perform contracts and agreements of every description, not inconsistent with law or with any provisions of this charter, with any person, association, or corporation, with any municipality or any county, or with the United States or the State of Montana, including agree-

(Testimony of Leo Kennerly.)

Defendants' Exhibit No. 17—(Continued)

ments with the State of Montana for the rendition of public services: Provided, That any contract involving payment of money by the corporation in excess of \$10,000 in any one fiscal year shall be subject to the approval of the Secretary of the Interior [311] or his duly authorized representative.

(g) For the purpose of obtaining any loan, to pledge or assign any chattels purchased with the proceeds of such loans, or any income arising from activities of the Tribe financed by the proceeds of such loan, or any income due or to become due on any notes, leases, or contracts taken as security for the reloan by the Tribe of the proceeds of such loan whether or not such notes, leases, or contracts, are in existence at the time, but no pledge or assignment shall be made to any person or agency, other than the Secretary of the Interior, without the approval of the Secretary of the Interior.

(h) To deposit corporate funds, from whatever source derived, in any national or state bank to the extent that such funds are insured by the Federal Deposit Insurance Corporation, or secured by a surety bond, or other security, approved by the Secretary of the Interior; or to deposit such funds in the postal savings bank or with a bonded disbursing officer of the United States to the credit of the Tribe.

(i) To sue and to be sued in courts of competent jurisdiction within the United States; but the grant or exercise of such power to sue and to be sued

(Testimony of Leo Kennerly.)

Defendants' Exhibit No. 17—(Continued)

shall not be deemed a consent by the said Tribe, or by the United States to the levy of any judgment, lien or attachment upon the property of the Tribe other than income or chattel specially pledged or assigned.

(j) To exercise such further incidental powers, not inconsistent with law, as may be necessary to the conduct of corporate business. [312]

Termination of Supervisory Powers.

6. Upon the request of the Blackfeet Tribal Council for the termination of any supervisory power reserved to the Secretary of the Interior under sections 5b, (2), 5f, 5g, 5h, and section 8 of this charter, the Secretary of the Interior, if he deems it wise and expediant so to do, shall approve such termination and submit it for ratification by the Tribe. It shall be effective upon ratification by a majority vote at an election in which at least thirty per cent of the adult members of the Tribe residing on the reservation shall vote. If at any time after ten years from the effective date of this charter, such request shall be made and the Secretary shall disapprove such termination or fail to approve or disapprove it within ninety days after its receipt, it may then be submitted by the Secretary of the Interior or by the Tribal Council to popular reefrendum of the adult members of the Tribe actually living within the reservation and if approved by two-thirds of the eligible voters, shall be effective.

(Testimony of Leo Kennerly.)

Defendants' Exhibit No. 17—(Continued)

Corporate Property:

7. No property rights of the Blackfeet Tribe, as heretofore constituted, shall be in any impaired by anything contained in this charter, and the tribal ownership of unallotted lands, whether or not assigned to the use of any particular individuals, is hereby expressly recognized.

The individually owned property of members of the Tribe shall not be subject to any corporate debts or liabilities, without such owners' consent. Any [313] existing lawful debts of the Tribe shall continue in force, except as such debts may be satisfied or canceled pursuant to law.

Corporate Dividends:

8. The Tribe may issue to each of its members a non-transferable certificate of membership evidencing the equal share of each member in the assets of the Tribe and may distribute per capita, among the recognized members of the Tribe, the net income of corporate activities including the proceeds of leases of tribal assets, including oil royalties over and above sums necessary to defray corporate obligations to members of the Tribe or to other persons and over and above all sums which may be devoted to the establishment of a reserve fund, and other expenses incurred by the Tribe for corporate purposes. Any such distribution of profits in any one year amounting to a per capita cash payment of \$100 or more, or amounting to a dis-

(Testimony of Leo Kennerly.)

Defendants' Exhibit No. 17—(Continued)
tribution of more than one-half of the accrued surplus, shall not be made without the approval of the Secretary of the Interior.

Corporate Accounts:

9. The officers of the Tribe shall maintain accurate and complete public accounts of the financial affairs of the Tribe, which shall clearly show all credits, debts, pledges and assignments, and shall furnish an annual balance sheet and report of the financial affairs of the Tribe to the Commissioner of Indian Affairs. The Tribal Council shall elect from within or without their number a Treasurer of the Tribe who, under their control and direction, shall be the custodian of all [314] moneys which come under the jurisdiction or control of the Tribal Council. He shall pay out money in accordance with the orders and resolutions of the Council, and no disbursements shall be made without the signature or approval of the Treasurer. He shall keep accounts of all receipts and disbursements and shall make written reports of same to the Tribal Council at each regular and special meeting. He shall be bonded in such an amount as the Council by resolution shall provide, such bond to be approved by the Commissioner of Indian Affairs. The books of the Treasurer shall be audited at the direction of the Council or of the Commissioner of Indian Affairs, and shall be open to inspection by members of the Tribe or duly authorized repre-

(Testimony of Leo Kennerly.)

Defendants' Exhibit No. 17—(Continued)
sentatives of the Government at all reasonable times.

Amendments:

10. This charter shall not be revoked or surrendered except by act of Congress, but amendments may be proposed by resolutions of the Council which if approved by the Secretary of the Interior, to be effective shall be ratified by a majority vote of the adult members living on the reservation at a popular referendum in which at least 30 per cent of the eligible voters vote.

Ratification:

11. This charter shall be effective from and after the date of its ratification by a majority vote of the adult members of the Blackfeet Tribe living on the Blackfeet Indian Reservation, provided at least 30 per cent of the eligible voters shall vote. [315] such ratification to be formally certified by the Superintendent of the Blackfeet Indian Agency and the Chairman of the Tribal Council of the Tribe.

Submitted by the Secretary of the Interior for ratification by the Blackfeet Tribe of the Blackfeet Indian Reservation in a popular referendum to be held on August 15, 1936.

[Seal]

HAROLD L. ICKES

Secretary of the Interior.

Washington, D. C., July 18, 1936

(Testimony of Leo Kennerly.)

Defendants' Exhibit No. 17—(Continued)

Certification

Pursuant to section 17 of the Act of June 18, 1934 (48 Stat. 984), this charter, issued on July 18, 1936, by the Secretary of the Interior to the Blackfeet Tribe of the Blackfeet Reservation, was duly submitted for ratification to the adult Indians living on the reservation and was on August 15, 1936, duly ratified and accepted by a vote of 737 for and 301 against, in an election in which over thirty per cent of those entitled to vote cast their ballots.

JOSEPH W. BROWN,

Chairman of the Blackfeet
Tribal Business Council.

C. L. GRAVES,

Superintendent, Blackfeet
Agency.

Q. Now, Mr. Kennerly, if you will turn to the Law and Order Code which I believe you said you have with you? A. Yes sir.

Mr. Allan: I was going to suggest that the [316] Code be likewise offered in evidence at this time.

The Court: Yes.

Mr. McCabe: We introduce in evidence as defendants exhibit number eighteen, same being a copy of the Law and Order Code of the Blackfeet Indian Tribe and particularly to Section 15

(Testimony of Leo Kennerly.)

Defendants' Exhibit No. 17—(Continued)
of Chapter 5 of the Code, pages sixteen and seventeen.

Whereupon defendants exhibit number eighteen was received in evidence without objection, and is in words and figures as follows, to-wit:

DEFENDANTS EXHIBIT No. 18

Law and Order Code of the Blackfeet Indian Tribe Chapter 1

The Blackfeet Indian Court.

Sec. 1. Jurisdiction

The Blackfeet Indian Court shall have jurisdiction over all offenses enumerated in Chapter 5, when committed by any Indian, as defined by this section, within the Blackfeet Indian Reservation.

With respects to any of the offenses enumerated in Chapter 5 over which Federal or State courts may have lawful jurisdiction, the jurisdiction of the Court shall be concurrent and not exclusive. It shall be the duty of the said Court to order delivery to the proper authorities of the State of Federal Government or of any other tribe or reservation, for prosecution, any offender, there to be dealt with according to law or regulations authorized by law, where such authorities consent to exercise jurisdiction lawfully bested in them [317] over the said offender.

For the purpose of the enforcement of these ordi-

(Testimony of Leo Kennerly.)

Defendants' Exhibit No. 18—(Continued)

nances an Indian shall be deemed to be any person of Indian descent who is a member of the Blackfeet Indian Tribe, and any other Indian over whom the Blackfeet Indian Court may have jurisdiction by virtue of an order issued by the Secretary of the Interior. The Blackfeet Indian Reservation shall be taken to include all territory within the reservation boundaries, including fee patented lands, roads, waters, bridges, and lands used for agency purposes.

All Blackfeet and any other Indians, over whom the Blackfeet Indian Court may have jurisdiction by virtue of an order issued by the Secretary of the Interior, employed in the Indian Service shall be subject to the jurisdiction of the Court, but any such employee appointed by the Secretary of the Interior shall have the right of appeal to the Secretary from any sentence of the court and no such sentence appealed shall become effective until it shall have been approved by the Secretary.

Sec. 2 Appointment of Judges

The Court shall consist of three judges, one of whom shall be designated as Chief Judge, and the others as associate judges. Each judge shall be appointed by the Tribal Business Council with the approval of the Commissioner of Indian Affairs. Their salary may be fixed and paid by the Commissioner of Indian Affairs or by the Tribe.

Each judge shall hold office for a period of four

(Testimony of Leo Kennerly.)

Defendants' Exhibit No. 18—(Continued)

years, unless sooner removed for cause or by reason [318] of the abolition of the said office, but shall be eligible for reappointment.

A person shall be eligible to serve as judge of the Court only if he (1) is a member of the Black-foot tribe, and (2) has never been convicted of a felony, or, within one year then last past, of a misdemeanor.

No judge shall be qualified to act as such in any case wherein he has any direct interest or wherein any relative by marriage or blood, in the first or second degrees, is a party.

Sec. 3 Removal of Judges

Any Judge of the Court may be suspended, dismissed or removed by the Tribal Business Council, with the approval of the Commissioner of Indian Affairs.

Sec. 4 Court Procedure

Sessions of the Court for the trial of cases shall be held by the Chief Judge, or, in case of his disability, by one of the associate judges selected for the occasion by all of the judges.

The time and place of court sessions, and all other details of judicial procedure not prescribed by these ordinances, shall be laid down in Rules of Court approved by the Tribal Business Council.

It shall be the duty of the judges of the Court to make recommendations to the Tribal Business Council for the enactment or amendment of such Rules of Court in the interests of improved judicial procedure.

(Testimony of Leo Kennerly.)

Defendants' Exhibit No. 18—(Continued)

Sec. 5 Appellate Proceedings

All the judges of the reservation shall sit together, at such times and at such places as they may [319] find proper and necessary for the dispatch of business, to hear appeals from judgments made by any judge at the trial sessions. There shall be established by Rule of Court the limitations, if any, to be placed upon the right of appeal both as to the types of cases which may be appealed and as to the manner in which appeals may be granted, according to the needs of their jurisdiction. In the absence of such Rule of Court any party aggrieved by a judgment may appeal to the full court upon giving proper assurance to the trial judge, through the posting of a bond or in any other manner, that he will satisfy the judgment if it is affirmed. In any case where a party has perfected his right to appeal as established herein or by Rule of Court, the judgment of the trial judge shall not be executed until after final disposition of the case by the full court. The full court may render judgment upon the case by a majority vote.

Sec. 6 Juries

In any case where, upon preliminary hearing by the Court, a substantial question of fact is raised, the defendant may demand a jury trial.

A list of eligible jurors shall be prepared by the Tribal Business Council each year.

In any case, a jury shall consist of six residents selected from the list of eligible jurors by the judge.

(Testimony of Leo Kennerly.)

Defendants' Exhibit No. 18—(Continued)

Any party to the case may challenge not more than three members of the jury panel so chosen.

The judge shall instruct the jury in the law governing the case and the jury shall bring a verdict for the complainant or the defendant. The judge shall [320] render judgment in accordance with the verdict and existing law. If the jury is unable to reach a unanimous verdict, verdict may be rendered by a majority vote.

Each juror who serves upon a jury shall be entitled to a fee of \$1.50 a day for each day his services are required in Court.

Sec. 7 Witnesses

The several judges of the Court shall have the power to issue subpoenas for the attendance of witnesses whether on their own motion or on the request of the Police Commissioner or Superintendent or any of the parties to the case, which subpoena shall bear the signature of the judge issuing it. A limit of five paid witnesses for each side is hereby established. Each witness answering such subpoena shall be entitled to a fee of \$0.50 a day for each day his services are required in court. Failure to obey such subpoena shall be deemed an offense as provided in Chapter 5, Sec. 35, of these ordinances. Service of such subpoenas shall be by a regularly acting member of the Indian Police or by an Indian appointed by the Court for that purpose.

Witnesses who testify voluntarily shall be paid their reasonable expenses by the party calling them.

(Testimony of Leo Kennerly.)

Defendants' Exhibit No. 18—(Continued)

Sec. 8 Professional Attorneys

Professional attorneys shall not appear in any proceeding before the Court unless Rules of Court have been adopted as set forth in section 4 of this Chapter prescribing conditions governing their admission and practice before the Court.

Sec. 9 Clerks [321]

The Tribal Business Council may with the approval of the Superintendent detail a clerk to act as Clerk of the Court. The Clerk of the Court shall render assistance to the Court, to the police force of the Reservation and to individual members of the Tribe in the drafting of complaints, subpoenas, warrants and commitments and any other documents incidental to the lawful functions of the Court. It shall be the further duty of said clerk to attend and to keep a written record of all proceedings of the Court, to administer oaths to witnesses, to collect all fines paid and to pay out all fees authorized by these ordinances, and to make an accounting thereof to the Treasurer of the Blackfeet Indian Tribe and to the Tribal Business Council.

Sec. 10 Records

The Court shall be required to keep, for inspection by duly qualified officials, a record of all proceedings of the Court, which record shall reflect the title of the case, the names of the parties, the substance of the complaint, the names and addresses

(Testimony of Leo Kennerly.)

Defendants' Exhibit No. 18—(Continued)
of all witnesses, the date of the hearing or trial, by whom conducted, the findings of the Court or jury, and the judgment, together with any other facts or circumstances deemed of importance to the case.

Sec. 11 Complaints

No complaint filed in the Court shall be valid unless it shall bear the signature of the complainant or complaining witness, witnesses by a *fully* qualified Judge of the Court or by the Superintendent or by [322] by any other qualified employee of the Reservation.

Sec. 12 Warrants to Apprehend

The Chief Judge of the Court shall have the authority to issue Warrants to Apprehend and shall have the power to delegate this authority to Associate Judges, said warrant to issue in the discretion of the Court only after a written complaint shall have been filed, bearing the signature of the complaining witness. Service of such warrants shall be made by a duly qualified member of the Indian Police or other police officer of the Blackfeet Tribe or of the United States Indian Service. No warrant to apprehend shall be valid unless it shall bear the signature of a duly qualified Judge of the Court.

Sec. 13 Arrest

No member of the Indian Police shall arrest any person for any offense defined by these regulations or by Federal law, except when such offense shall

(Testimony of Leo Kennerly.)

Defendants' Exhibit No. 18—(Continued)

occur in the presence of the arresting officer or he shall have reasonable evidence that the person arrested has committed an offense or the officer shall have a warrant commanding him to apprehend such person.

Sec. 14 Search Warrants

The Judges of the Court shall have authority to issue warrants for search and seizure of the premises and property of any person under the jurisdiction of said Court. However, no warrant of Search and Seizure shall be issued except upon a duly signed and written complaint based upon reliable information or belief and charging the commission of some offense against the tribe. [323] No warrant for search and seizure shall be valid unless it contains the name or description of the person or property to be searched and describes the articles or property to be seized and bears the signature of a duly qualified Judge of the Court. Service of Warrants of Search and Seizure shall be made only by members of the Indian Police or police officers of the Blackfeet Tribe or of the United States Indian Service.

No policeman shall search or seize any property without a warrant unless he shall know, or have reasonable cause to believe, that the person in possession of such property is engaged in the commission of an offense under these ordinances. Unlawful search or seizure will be deemed trespass and

(Testimony of Leo Kennerly.)

Defendants' Exhibit No. 18—(Continued)
punished in accordance with Chapter 5, Section 15
of these ordinances.

Sec. 15 Commitments

No Indian shall be detained, jailed or imprisoned under these ordinances for a longer period than forty-eight (48) hours unless there be issued a commitment bearing the signature of a duly qualified Judge of the Court. There shall be issued, for each Indian held for trial, a Temporary Commitment on the forms prescribed in these regulations.

Sec. 16 Bail or Bond

Every Indian charged with an offense before the Court may be admitted to bail. Bail shall be by cash bond or by two reliable members of any Indian tribe who shall appear before a Judge of the Court, where complaint has been filed and there execute an agreement in compliance with the form provided therefor and made a part of [324] these ordinances. Maximum bonds shall not be in excess of \$360.00 with a minimum bond not to exceed \$50.

Sec. 17 Definition of Signature

The term "signature" as used in these regulations shall be defined as the written signature, official seal, or the witnessed thumb print or mark of any individual.

Sec. 18 Relation With the Court

The Court may request employees of the Indian Service, particularly those who are engaged in social

(Testimony of Leo Kennerly.)

Defendants' Exhibit No. 18—(Continued)

service, health and educational work, to assist in the preparation of the facts in any case and in the proper treatment of individual offenders.

Whenever the Court is in doubt as to the meaning of any law, treaty or regulation it may request the Superintendent to furnish an opinion on the point in question.

Chapter 2

Civil Actions

Sec. 1 Jurisdiction

The Court shall have jurisdiction of all suits wherein the defendant is a member of the tribe and of all other suits between members and non-members which are brought before the Court by stipulation of both parties. No judgment shall be given on any suit unless the defendant has actually received notice of such suit and ample opportunity to appear in court in his defense. Evidence of the receipt of the notice shall be kept as part of the record in the case. In all civil suits the complainant may be required to deposit with the clerk [325] of the court a fee or other security in a reasonable amount to cover costs and disbursements in the case.

Sec. 2 Law Applicable in Civil Actions

In all civil cases the Court shall apply any laws of the United States that may be applicable, any authorized regulations of the Interior Department,

(Testimony of Leo Kennerly.)

Defendants' Exhibit No. 18—(Continued)
and any ordinances or customs of the tribe, not prohibited by such Federal laws.

Where any doubt arises as to the customs and usages of the tribe the Court may request the advice of counsellors familiar with these customs and usages.

Any matters that are not covered by the traditional customs or by ordinances of the tribe, or by applicable Federal laws and regulations, shall be decided by the Court of Indian Offenses according to the laws of the State.

Sec. 3 Judgments in Civil Actions.

In all civil cases, judgment shall consist of an order of the Court awarding money damages to be paid to the injured party, or directing the surrender of certain property to the injured party, or the performance of some other act for the benefit of the injured party.

Where the injury inflicted was the result of carelessness of the defendant, the judgment shall fairly compensate the injured party for the loss he has suffered.

Where the injury was deliberately inflicted, the judgment shall impose an additional penalty upon the defendant, which additional penalty may run either in favor of the injured party or in favor of the Tribe.

Where the injury was inflicted as the result [326] of accident, or where both the complainant and the defendant were at fault, the judgment shall com-

(Testimony of Leo Kennerly.)

Defendants' Exhibit No. 18—(Continued)

pensate the injured party for a reasonable part of the loss he has suffered.

Sec. 4 Costs in Civil Actions

The Court may assess the accruing costs of the case against the party or parties against whom judgment is given. Such costs shall consist of the expenses of voluntary witnesses for which either party may be responsible under Section 7 of Chapter 1, and the fees of jurors in those cases where a jury trial is had, and any further incidental expenses connected with the procedure before the Court as the Court may direct.

Sec. 5 Payment of Judgments From Individual Indian Moneys

Whenever the Blackfeet Indian Court shall have ordered payment of money damages to an injured party and the losing party refuses to make such payment within the time set for payment by the Court, and when the losing party has sufficient funds to his credit at the Agency office to pay all or part of such judgment, the Superintendent shall be requested to hold Individual Indian Moneys to his credit and pay them out upon the order of the Court. Only moneys of the individual and not of his family may be held to pay such judgments. Accruals may be also held to pay such Court charges.

(Testimony of Leo Kennerly.)

Defendants' Exhibit No. 18—(Continued)

Chapter 3

Domestic Relations

Sec. 1 Recording of Marriages, Divorces and Adoptions

All Indian marriages, divorces and adoptions shall be recorded within three months at the Blackfeet [327] Indian Agency. Failure to do so shall subject the offender to a fine not to exceed five dollars.

Sec. 2 Marriages, Divorces and Adoptions

All members of the Blackfeet Indian Tribe shall hereafter be governed by State law and subject to State jurisdiction with respect to marriages, divorces and adoptions hereafter consummated.

Sec. 3 Determination of Paternity and Support

The Court shall have jurisdiction of all suits brought to determine the paternity of a child and to obtain a judgment for the support of the child. A judgment of the Court establishing the identity of the father of the child shall be conclusive of that fact in all subsequent determinations of inheritance by the Department of the Interior or by the Court.

Sec. 4 Determination of Heirs

When any member of the tribe dies leaving property other than an allotment or other trust property subject to the jurisdiction of the United States, any member claiming to be heir of the decedent may bring a suit in the Court to have the Court

(Testimony of Leo Kennerly.)

Defendants' Exhibit No. 18—(Continued)

determine the heirs of the decedent and to divide among the heirs such property of the decedent. No determination of the heirs shall be made unless all the possible heirs known to the Court, to the Superintendent, and to the claimant have been notified of the suit and given full opportunity to come before the Court and defend their interests. Possible heirs who are not residents of the reservation under the jurisdiction of the Court must be notified by mail and a copy of the notice must be preserved in the [328] record of the case.

In the determination of heirs the Court shall apply the custom of the tribe as to inheritance if such custom is proved. Otherwise, the Court shall apply State law in deciding what relatives of the decedent are entitled to be his heirs.

Where the estate of the decedent includes any interest in restricted allotted lands or other property held in trust by the United States, over which the Examiner of Inheritance would have jurisdiction, the Court may distribute only such property as does not come under the jurisdiction of the Examiner of Inheritance, and the determination of heirs by the Court may be reviewed, on appeal, and the judgment of the Court modified or set aside by the said Examiner of Inheritance, with the approval of the Secretary of the Interior, if law and justice so require.

(Testimony of Leo Kennerly.)

Defendants' Exhibit No. 18—(Continued)

Sec. 5 Approval of Wills

When any member of the tribe dies, leaving a will disposing only of property other than an allotment or other trust property subject to the jurisdiction of the United States, the Court shall, at the request of any member of the tribe named in the will or any other interested party, determine the validity of the will after giving notice and full opportunity to appear in court to all persons who might be heirs of the decedent, as under Section 4 of this Chapter. A will shall be deemed to be valid if the decedent had a sane mind and understood what he was doing when he made the will and was not subject to any undue influence of any kind from another person, and if the will was made in writing and [329] signed by the decedent in the presence of a representative of the Blackfeet Tribal Business Council and a representative of the Superintendent of the Blackfeet Indian Agency, who sign such will as witnesses, provided that if a will is made under circumstances when the attendance of such representatives cannot be secured other witnesses may serve. If the Court determines the will to be validly executed, it shall order the property described in the will to be given to the persons named in the will or to their heirs, but no distribution of property shall be made in violation of a proved tribal custom which restricts the privilege of tribal members to distribute property by will.

(Testimony of Leo Kennerly.)

Defendants' Exhibit No. 18—(Continued)

Chapter 4

Sentences

Sec. 1 Nature of Sentences

Any Indian who has been convicted by the Court of violation of a provision of the Blackfeet Law and Order Code shall be sentenced by the Court to work for the benefit of the tribe for any period found by the Court to be appropriate; but the period fixed shall not exceed the maximum period set for the offense in the Code, and shall begin to run from the day of the sentence. During the period of sentence the convicted Indian may be confined in the agency jail if so directed by the Court. The work shall be done under the supervision of the Superintendent or of an authorized agent or committee of the Tribal Business Council as the Court may provide. [330]

Whenever any convicted Indian shall be unable or unwilling to work, the Court shall, in its discretion, sentence him to imprisonment for the period of the sentence or to pay a fine equal to \$2 a day for the same period. Such fine shall be paid in cash, or in commodities or other personal property of the required value as may be directed by the Court.

In addition to any other sentence, the Court may require an offender who has inflicted injury upon the person or property of any individual to make restitution or to compensate the party injured,

(Testimony of Leo Kennerly.)

Defendants' Exhibit No. 18—(Continued)

through the surrender of property, the payment of money damages, or the performance of any other act for the benefit of the injured party.

In determining the character and duration of the sentence which shall be imposed, the Court shall take into consideration the previous conduct of the defendant, the circumstances under which the offense was committed, and whether the offense was malicious or willful and whether the offender has attempted to make amends, and shall give due consideration to the extent of the defendant's resources and the needs of his dependents. The penalties listed in Chapter 5 of these ordinances are maximum penalties to be inflicted only in extreme cases.

Sec. 2 Probation

Where sentence has been imposed upon any Indian who has not previously been convicted of any offense, the Court may in its discretion suspend the sentence imposed and allow the offender his freedom as probation, upon [331] his signing a pledge of good conduct during the period of the sentence upon the form provided therefor and made a part of these ordinances.

An Indian who shall violate his probation pledge shall be required to serve the original sentence plus an additional half of such sentence as penalty for the violation of his pledge.

Sec. 3 Parole

Any Indian committed by the Court who shall

(Testimony of Leo Kennerly.)

Defendants' Exhibit No. 18—(Continued)

have without misconduct served one half of the sentence imposed by such Court shall be eligible to parole. Parole shall be granted only upon the signing of the form provided therefor and made a part of these ordinances.

Any Indian who shall violate any of the provisions of such parole shall be punished by being required to serve the whole of the original sentence.

Sec. 4 Board of Pardons and Parole

The Chief Judge of the Blackfeet Indian Court, a representative of the Blackfeet Tribal Business Council designated by the Chairman of the Council, and the Superintendent of the Blackfeet Indian Agency, or his designated representative, shall constitute a Board of Pardons and Parole, with power to pardon or parole persons under court sentence, by majority vote of the Board.

Sec. 5 Juvenile Delinquency

Whenever any Indian who is under the age of 18 years is accused of committing one of the offenses enumerated in the Law and Order Code of the Blackfeet Tribe, the judge may in his discretion hear and determine [332] the case in private and in an informal manner, and, if the accused is found to be guilty, may in lieu of sentence place such delinquent for a designated period under the supervision of a responsible person selected by him or may take such other action as he may deem advisable in the circumstances.

(Testimony of Leo Kennerly.)

Defendants' Exhibit No. 18—(Continued)

Sec. 6 Deposit and Disposition of Fines.

All money fines imposed for the commission of an offense shall be paid to the Clerk of the Court and by him paid over to the Treasurer of the Tribe to be held as a special account. The said Treasurer shall pay out of such account, upon the order of the Clerk of the Court signed by a judge of the Court, specified fees to specified jurors or witnesses authorized under the ordinances of the Blackfeet Tribe. The Clerk of the Court shall keep an accounting of all such deposits and withdrawals for the inspection of any person interested. Whenever such fund shall exceed the amount necessary with a reasonable reserve for the payment of the court expenses before mentioned, the Tribal Business Council shall designate further expenses of the work of the Court, or other public expenses, which shall be paid from these funds.

Wherever a fine is paid in property, or wherever property is confiscated pursuant to any tribal ordinances, the property shall be turned over under the supervision of the Clerk of the Court to the custody of the Treasurer of the Tribe to be sold, or, if the Tribal Business Council so directs, to be disposed of in other ways for the benefit of the tribe. [333] The proceeds of any sale of such property shall be deposited in the same manner as money fines.

(Testimony of Leo Kennerly.)

Defendants' Exhibit No. 18—(Continued)

Chapter 5

Code of Indian Tribal Offenses

Sec. 1. Assault.

Any Indian who shall attempt or threaten bodily harm to another person through unlawful force or violence shall be deemed guilty of assault, and upon conviction thereof shall be sentenced to labor for a period not to exceed five days, a \$10.00 fine or both such fine and imprisonment, or shall be required to furnish a satisfactory bond to keep the peace.

Sec. 2. Assault and Battery.

Any Indian who shall wilfully strike another person or otherwise inflict bodily injury, or who shall be offering violence cause another to harm himself shall be deemed guilty of assault and battery and upon conviction thereof shall be sentenced to labor for a period not to exceed ninety days or fine of \$180.00 or both such fine and imprisonment.

Sec. 3. Carrying Concealed Weapons.

Any Indian who shall go about in public places armed with a dangerous weapon concealed upon his person unless he shall have a permit signed by a judge of the Blackfeet Indian Court and countersigned by the Superintendent of the Blackfeet Agency, shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to labor for a period not to exceed 30 days or a fine of \$50.00, or both such fine and [334] imprisonment; and the weapons so carried may be confiscated.

(Testimony of Leo Kennerly.)

Defendants' Exhibit No. 18—(Continued)

Sec. 4. Abduction.

Any Indian who shall wilfully take away or detain another person against his will or without the consent of the parent or other person having lawful care or charge of him, shall be deemed guilty of abduction and upon conviction thereof shall be sentenced to labor for a period not to exceed 90 days or a fine of \$180.00, or both such fine and imprisonment.

Sec. 5. Theft.

Any Indian who shall take the property of another person, with intent to steal, shall be deemed guilty of theft and upon conviction thereof shall be sentenced to labor for a period not to exceed ninety days, or a fine of \$180.00, or both such fine and imprisonment.

Sec. 6. Embezzlement.

Any Indian who shall, having lawful custody of property not his own, appropriate the same to his own use with intent to deprive the owner thereof, shall be deemed guilty of embezzlement and upon conviction thereof shall be sentenced to labor for a period not to exceed ninety days or a fine of \$180.00, or both such fine and imprisonment.

Sec. 7. Fraud.

Any Indian who shall by wilful misrepresentation or deceit, or by false interpreting, or by the use of false weights or measures obtain any money

(Testimony of Leo Kennerly.)

Defendants' Exhibit No. 18—(Continued)

or other property, shall be deemed guilty of fraud and upon [335] conviction thereof shall be sentenced to labor for a period not to exceed ninety days or a fine of \$180.00 or both such fine and imprisonment.

Sec. 8. Forgery.

Any Indian who shall, with intent to defraud, falsely sign, execute or alter any written instrument, shall be deemed guilty of forgery and upon conviction thereof shall be sentenced to labor for a period not to exceed ninety days, or a fine of \$180.00, or both such fine and imprisonment.

Sec. 9. Misbranding.

Any Indian who shall knowingly and wilfully misbrand or alter any brand or mark on any live-stock of another person, shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to labor for a period not to exceed ninety days or a fine of \$180.00, or both such fine and imprisonment.

Sec. 10. Receiving Stolen Property.

Any Indian who shall receive or conceal or aid in concealing or receiving any property, knowing the same to be stolen, embezzled, or obtained by fraud or false pretense, robbery or burglary, shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to labor for a period not to exceed forty-five days or a fine of \$90.00 or both such fine and imprisonment.

(Testimony of Leo Kennerly.)

Defendants' Exhibit No. 18—(Continued)

Sec. 11. Extortion.

Any Indian who shall wilfully, by making false charges against another person or by any other means whatsoever, extort or attempt to extort any moneys, goods, [336] property, or anything else of any value, shall be deemed guilty of extortion and upon conviction thereof shall be sentenced to labor for a period not to exceed fifteen days or a fine of \$30.00, or both.

Sec. 12. Disorderly Conduct.

Any Indian who shall engage in fighting in a public place, disturb or annoy any public or religious assembly, or appear in a public or private place in an intoxicated and disorderly condition, or who shall engage in any other act of public indecency or immorality, shall be deemed guilty of disorderly conduct and upon conviction thereof shall be sentenced to labor for a period not to exceed fifteen days or a fine of \$30.00, or both.

Sec. 13. Reckless Driving.

Any Indian who shall drive or operate any automobile, wagon, or any other vehicle in a manner dangerous to the public safety, shall be deemed guilty of reckless driving and upon conviction thereof shall be sentenced to labor for a period not to exceed fifteen days, and may be deprived of the right to operate any automobile for a period not to exceed six months. For the commission of such offense while under the influence of liquor, the of-

(Testimony of Leo Kennerly.)

Defendants' Exhibit No. 18—(Continued)

fender may be sentenced to labor for a period not to exceed forty-five days or a fine of \$90.00 or both such fine and imprisonment.

Sec. 14. Malicious Mischief.

Any Indian who shall maliciously disturb, injure or destroy any livestock or other domestic animal or other property, shall be deemed guilty of malicious [337] mischief and upon conviction thereof shall be sentenced to labor for a period not to exceed ninety days or a fine of \$180.00, or both such fine and imprisonment.

Sec. 15. Trespass.

Any Indian who shall go upon or pass over any cultivated or enclosed lands of another person and shall refuse to go immediately therefrom on the request of the owner or occupant thereof, or who shall wilfully and knowingly allow livestock to occupy or graze on the cultivated or enclosed lands, shall be deemed guilty of an offense and upon conviction shall be punished by a fine not to exceed \$5 and the cost of the Court, in addition to any award of damages for the benefit of the injured party.

Sec. 16. Injury to Public Property.

Any Indian who shall, without proper authority, use or injure any public property of the tribe, shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to labor for a period not to exceed fifteen days or a fine of \$30, or both.

(Testimony of Leo Kennerly.)

Defendants' Exhibit No. 18—(Continued)

Sec. 17. Maintaining a Public Nuisance.

Any Indian who shall act in such a manner, or permit his property to fall into such condition as to injure or endanger the safety, health, comfort, or property of his neighbors, shall be deemed guilty of an offence and upon conviction thereof shall be sentenced to labor for a period not to exceed five days or a fine of \$10.00, or both, and may be required to remove such nuisance when so ordered by the Court.

Sec. 18. Liquor Violation.

Any Indian who shall possess, sell, trade, [338] transport or manufacture any beer, ale, wine, whiskey or any article whatsoever which produces alcoholic intoxication, shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to labor for a period not to exceed 60 days or a fine of \$120, or both, and shall forfeit to the Blackfeet Tribe any vehicle, or any other property, used in any violation of this section. Such vehicle, or other property, may be sold at public auction, under Court order, for the benefit of the Blackfeet Tribe.

Sec. 19. Cruelty to Animals.

Any Indian who shall torture or cruelly mistreat any animal, shall be deemed guilty of an offense and shall be sentenced to labor for a period not to exceed fifteen days or a fine of \$30.00, or both.

(Testimony of Leo Kennerly.)

Defendants' Exhibit No. 18—(Continued)

Sec. 20. Adultery.

Any Indian who shall have sexual intercourse with another person, either of such persons being married to a third person, shall be deemed guilty of adultery and upon conviction thereof shall be sentenced to labor for a period not to exceed fifteen days, or a fine of \$30.00, or both such fine and imprisonment.

Sec. 21. Illicit Cohabitation.

Any Indian who shall live or cohabit with another as man and wife not then and there being married shall be deemed guilty of illicit cohabitation and upon conviction thereof shall be sentenced to labor for a period not to exceed fifteen days, or a fine of \$30.00, or both such fine and imprisonment. [339]

Sec. 22. Prostitution.

Any Indian who shall practice prostitution, or who shall knowingly keep, maintain, rent or lease any house, room, tent, or other place for the purpose of prostitution shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to labor for a period not to exceed ninety days or a fine of \$180.00, or both such fine and imprisonment.

Sec. 23. Contagious and Infectious Diseases.

Any Indian who shall violate any provision of the Montana State Public Health rules and regula-

(Testimony of Leo Kennerly.)

Defendants' Exhibit No. 18—(Continued)

tions shall be deemed guilty of an offense and upon conviction thereof shall be sentenced in the discretion of the Blackfeet Court, such sentence not to exceed that provided by the said State rules and regulations.

Sec. 24. Failure to Support Dependent Persons.

Any Indian who shall, because of habitual intemperance or gambling, or for any other reason, refuse or neglect to furnish food, shelter, or care to those dependent upon him, including any dependent children born out of wedlock, shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to labor for a period not to exceed three months, for the benefit of such dependents.

Sec. 25. Failure to Send Children to School.

Any Indian who shall, without good cause, neglect or refuse to send his children, or any children under his care, to school shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to labor for a period not to exceed five days or a [340] fine of \$10.00, or both.

Sec. 26. Contribution to the Delinquency of a Minor.

Any Indian who shall wilfully contribute to the delinquency of any minor shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to labor for a period not to exceed three

(Testimony of Leo Kennerly.)

Defendants' Exhibit No. 18—(Continued)
months or a fine of \$180.00, or both such fine and imprisonment.

Sec. 27. Bribery.

Any Indian who shall give any money, property or services, or anything else of value to another person with corrupt intent to influence another in the discharge of his public duties or conduct, and any Indian who shall accept, solicit or attempt to solicit any bribe, as above defined, shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to labor for a period not to exceed three months or a fine of \$180, or both such fine and imprisonment. Any councilman convicted of bribery shall be subject to expulsion from the Tribal Business Council, as provided in Article V, Section 2, of the Constitution of the Blackfeet Tribe. Any other tribal officer convicted of bribery shall be deprived of his office by order of the Court.

Sec. 28. Perjury.

Any Indian who shall wilfully and deliberately, in any judicial proceeding of the Court, falsely swear or interpret, or shall make a sworn statement or affidavit knowing the same to be untrue, or shall induce or procure another person so to do, shall be deemed guilty of [341] perjury and upon conviction thereof shall be sentenced to labor for a period not to exceed three months or a fine of \$180.00, or both.

(Testimony of Leo Kennerly.)

Defendants' Exhibit No. 18—(Continued)

Sec. 29. False Arrest.

Any Indian who shall wilfully and knowingly make, or cause to be made, the unlawful arrest, detention or imprisonment of another person, shall be deemed guilty of an offense, and upon conviction thereof shall be sentenced to labor for a period not to exceed three months or a fine of \$180.00, or both.

Sec. 30. Resisting Lawful Arrest.

Any Indian who shall wilfully and knowingly, by force or violence, resist or assist another person to resist a lawful arrest shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to labor for a period not to exceed fifteen days or a fine of \$30, or both.

Sec. 30. Refusing to Aid Officer.

Any Indian who shall neglect or refuse, when called upon by any Indian Police or other police officer of the Blackfeet Tribe or the United States Indian Service, to assist in the arrest of any person charged with or convicted of any offense or in securing such offender when apprehended, or in conveying such offender to the nearest place of confinement shall be deemed guilty of an offense, and upon conviction, shall be sentenced to labor for a period not to exceed ten days or a fine of \$20.00, or both such fine and imprisonment.

Sec. 32. Escape.

Any Indian, who, being in lawful custody, for

(Testimony of Leo Kennerly.)

Defendants' Exhibit No. 18—(Continued)

[342] any offense, shall escape or attempt to escape or who shall permit or assist or attempt to permit or assist another person to escape from lawful custody shall be deemed guilty of an offense, and upon conviction thereof shall be sentenced to labor for a period not to exceed three months or a fine of \$180.00, or both.

Sec. 33. Disobedience to Lawful Orders of Court.

Any Indian who shall wilfully disobey any order, subpoena, warrant or command duly issued, made or given by the Blackfeet Indian Court or any officer thereof shall be deemed guilty of an offense and upon conviction thereof shall be fined in an amount not exceeding \$180.00, or sentenced to labor for a period not to exceed three months.

Sec. 34. Attempted Rape.

Any Indian who shall wilfully and knowingly by force or violence attempt to rape another or assist in permitting an attempted rape shall be deemed guilty of an offense and upon conviction thereof shall be sentenced to labor for a period not to exceed ninety days or a fine of \$180 or both such fine and imprisonment.

Chapter 6

Law Enforcement

Sec. 1. Police Officers.

The ordinances of the Blackfeet Indian Tribe shall be enforced by any duly qualified enforcement officer.

(Testimony of Leo Kennerly.)

Defendants' Exhibit No. 18—(Continued)

Sec. 2. Police Commissions.

The Tribal Business Council may issue police commissions either to persons employed by the Indian [343] Service, to other members of the tribe properly qualified for the performance of police duties, or to any other law enforcement officer.

Sec. 3. Duties of Police.

Police officers of the Blackfeet Tribe shall be officers of the Blackfeet Indian Court, and shall execute all orders of the Court and all ordinances and resolutions of the Tribal Business Council.

Sec. 4. Law Enforcement.

All resolutions and ordinances of the Tribal Business Council shall be faithfully enforced by officers of the Tribe, including the judges, regardless of their personal opinions as to the wisdom or constitutionality of such resolutions or ordinances.

Sec. 5. Extradition.

The Chairman of the Tribal Business Council may order the return to any other jurisdiction of any person accused of crime therein, and may request the authorities of other jurisdictions to return to the Blackfeet Indian Reservation persons accused or convicted of crime who have fled from the jurisdiction of the Blackfeet Indian Court.

(Testimony of Leo Kennerly.)

Defendants' Exhibit No. 18—(Continued)

Chapter 7

Legal Forms

Form No. 1

Criminal Complaint

Blackfeet Indian Court

Blackfeet Indian Reservation

Blackfeet Indian Tribe

vs.

....., Defendant

The above named defendant is charged by this [344] with the offense of in violation of Sec. ..., Chapter ..., Law and Order Code of the Blackfeet Tribe, to-wit: the said defendant did on or about the ... day of, 19.. within the Blackfeet Indian Reservation. and against the peace and dignity of the Blackfeet Indian Tribe.

(Signed)

Complaining Witness

Witnessed

.....

(Judge of the Blackfeet Indian Court or Superintendent of the Blackfeet Indian Agency)

Dated:

Personal History of Defendant: (To be filled out by Clerk of Court)

Married or Single..... Occupation.....

No. of Dependents..... Age.....

Condition of Health..... Address.....

(Testimony of Leo Kennerly.)

Defendants' Exhibit No. 18—(Continued)

Previous Arrests and Convictions.....

Name and address of witnesses:

.....
.....

Form No. 1A

Notice of Action

Blackfeet Indian Court

Blackfeet Indian Reservation

.....

vs.

....., Defendant

To....., Defendant.

You are hereby notified that the attached complaint has been filed against you and you are herewith [345] ordered to appear in Court at....., to answer to such complaint on this.....day of , 19....

Dated:

.....

Judge of the Blackfeet Indian Court, Blackfeet Indian Reservation.

I have this day served the above order upon the above named defendant.

Dated:

.....

Officer's Signature

.....

Title

(Testimony of Leo Kennerly.)

Defendants' Exhibit No. 18—(Continued)

Form No. 2

Civil Complaint

Blackfeet Indian Court

Blackfeet Indian Reservation

....., Complainant

vs.

....., Defendant

The above-named complainant, complaining of the
defendant, declares:

.....

By reason of the foregoing facts, the complainant
demands that the defendant shall be adjudged to
make just redress.

.....

Complainant

Witnessed:

.....

(Judge of the Blackfeet Indian Court or Superin-
tendent of the Blackfeet Indian Agency)

Dated:

Form No. 3

Subpoena

Blackfeet Indian Court

Blackfeet Indian Reservation

.....

vs.

.....

[346]

To.....

.....

(Testimony of Leo Kennerly.)

Defendants' Exhibit No. 18—(Continued)

You are hereby commanded to appear before the above-entitled court at on the day of, 19.., at o'clock ..M., to serve as..... in the above-entitled case. Failure to obey this subpoena, without good cause, makes you liable to prosecution.

Dated:

.....

Judge of the Blackfeet Indian
Court

.....

Clerk of the Blackfeet Indian
Court

Form No. 4

Warrant to Apprehend

Blackfeet Indian Court

Blackfeet Indian Reservation

Blackfeet Indian Tribe

vs.

....., Defendant

To any Indian Police, Police Officer of the Blackfeet Indian Tribe, or Officer of the United States Indian Service:

Whereas a complaint has been filed in the above-entitled court charging that the offense of..... in violation of Sec., Chapter, Law and Order Code of the Blackfeet Tribe, has been

(Testimony of Leo Kennerly.)

Defendants' Exhibit No. 18—(Continued)
committed and accusing the above named defendant thereof, you are commanded to apprehend and bring the said defendant before a judge of this Court to show cause why he should not be held for trial.

Dated:

.....

Judge of the Blackfeet Indian
Court [347]

Received the within warrant on the day
of, 19.., and executed the same on the
.....day of, 19.., by arresting the
within named defendant at and now
have him before the court as commanded.

Dated:

.....

(Officer's Signature)

.....

(Title)

Form No. 5
Search Warrant

Blackfeet Indian Court
Blackfeet Indian Reservation

To any Indian Police, Police Officer of the Black-
feet Indian Tribe, or Officer of the United
States Indian Service:

(Testimony of Leo Kennerly.)

Defendants' Exhibit No. 18—(Continued)

A complaint having been filed before me by
 charging that certain property,
 to-wit:
 is in the possession of at the fol-
 lowing described place, to-wit:
 in violation of Sec., Chapter, Law
 and Order Code of the Blackfeet Tribe.

You are therefore commanded to make immedi-
 ate search of the person or premises described
 above for the following described property, to-wit:

and if the same be found or any part thereof to
 arrest the said and bring him and
 the property before [348] a judge of this Court to
 show cause why he should not be held for trial.

Date:

.....

Judge of the Blackfeet Indian
 Court

Return

Received the within warrant on the day
 of, 19.., and executed the same on
 the day of, 19...

.....

.....

(Title)

Dated this day of, 19...

(Testimony of Leo Kennerly.)

Defendants' Exhibit No. 18—(Continued)

Form No. 6

Bond

Blackfeet Indian Court

Blackfeet Indian Reservation

Blackfeet Indian Tribe

vs.

....., Defendant

Be it remembered, that the undersigned bondsmen upon their word of honor promise and agree:

That if the above named defendant fails to appear personally before the above entitled court, on the day of, 19.., there to answer to a complaint duly filed against him, and at such other time or times as he may be ordered by the Court until final disposition of the case, the undersigned bondsmen will forfeit the amount of bond set by the Chief Judge and this bond may be collected through any moneys on deposit of which may become deposited to his credit in the Agency Office.

[349]

Signed.....

Signed.....

Signed and agreed to before me this day of, 19...

.....

Judge of the Blackfeet Indian
Court

(Testimony of Leo Kennerly.)

Defendants' Exhibit No. 18—(Continued)

Form No. 7

Temporary Commitment

Blackfeet Indian Court

Blackfeet Indian Reservation

Blackfeet Indian Tribe

vs.

....., Defendant

To the Keeper of the Jail of the Blackfeet Indian
Tribe:

Whereas the above named defendant has been lawfully arrested and is now before the Court; and whereas good cause has been shown why he should be detained until the final hearing and decision of his case, you are hereby commanded to receive the above-named defendant in custody and hold him until the next session or further order of the court.

.....

Judge of the Blackfeet Indian
Court

Dated:

(Testimony of Leo Kennerly.)

Defendants' Exhibit No. 18—(Continued)

Form No. 8

Final Commitment

Blackfeet Indian Court

Blackfeet Indian Reservation

Blackfeet Indian Tribe

vs.

....., Defendant

To the Keeper of the Jail of the Blackfeet Indian
Tribe:

The above-named defendant having this day been found guilty of violation of Sec. ..., Chapter ..., [350] Law and Order Code of the Blackfeet Tribe, by committing the offense of....., I have adjudged that he serve in jail. You are therefore commanded to receive him in custody for the period stated unless otherwise ordered by the Court.

.....

Judge of the Blackfeet Indian

Court Jurisdiction

Dated:

(Testimony of Leo Kennerly.)

Defendants' Exhibit No. 18—(Continued)

Form No. 9

Judgment Order

Blackfeet Indian Court

Blackfeet Indian Reservation

.....

vs.

....., Defendant

The above-entitled case having been heard before
this Court, judgment is this day rendered to the
following effect

.....

Judge of the Blackfeet Indian
Court

Dated:

Satisfaction of Judgment

Satisfaction of the above judgment is hereby
acknowledged.

Dated:

.....

Name of Party, Policeman or
Jailer

Recorded

Dated:

.....

Clerk of the Blackfeet Indian
Court [351]

(Testimony of Leo Kennerly.)

Defendants' Exhibit No. 18—(Continued)

Form No. 10

Probation Pledge

Blackfeet Indian Court

Blackfeet Indian Reservation

Blackfeet Indian Tribe

vs.

....., Defendant

I, the undersigned, having been sentenced by the above Court on this day, the day of, 19..., for violation of Sec., Chapter, Law and Order Code of the Blackfeet Indian Tribe, for committing the offense of, and not having been previously sentenced by this Court for any offense, agree, upon the suspension of this sentence, not to violate any law of regulation of the Blackfeet Indian Tribe, or of the United States, or otherwise wilfully engage in any misconduct during the term of this probation, which shall expire on the day of, 19...

Agreed.

.....

Prisoner

Order of the Court

The above named prisoner having signed the foregoing agreement, is hereby allowed his freedom under the terms set forth.

Dated:

.....

Judge of the Blackfeet Indian
Court [352]

(Testimony of Leo Kennerly.)

Defendants' Exhibit No. 18—(Continued)

Form No. 11

Parole Agreement

Blackfeet Indian Court

Blackfeet Indian Reservation

Blackfeet Indian Tribe

vs.

....., Defendant

I, the undersigned, having served one half the sentence imposed upon me by the above Court on the day of, 19.., for violation of Sec., Chapter, Law and Order Code of the Blackfeet Indian Tribe, for committing the offense of, agree, upon release, not to violate any law or regulation of the Blackfeet Indian Tribe or of the United States, or otherwise wilfully engage in any misconduct during the term of this parole which shall expire on the..... day of, 19...

Agreed.

.....

Prisoner

(Testimony of Leo Kennerly.)

Defendants' Exhibit No. 18—(Continued)

Order of the Court

To the Keeper of the Jail of the Blackfeet Indian
Tribe:

The above named prisoner having signed the foregoing agreement, you are hereby ordered to release him from custody, forthwith.

Dated:

.....

Judge of the Blackfeet Indian
Court [353]

Cross Examination

By Mr. Allan:

Q. Mr. Kennerly, this Law and Order Code is the Criminal Code of the Blackfeet Indian Reservation, is it not? A. That is right.

Q. And it applies and the jurisdiction is concurrent with the District Court of the United States, or in the Tribal Indian Court, is that correct?

A. Why, I guess so,—my interpretation as given us by the Department of the Interior, I think it specifically gives this power to the Tribal Council.

Q. Section fifteen in relation to trespass is a form of provision to prohibit trespassing on cultivated lands, or enclosed lands, isn't that correct?

A. That is right.

(Testimony of Leo Kennerly.)

Q. It has no relation to range country?

A. May I explain why?

Q. No, we will take the regulation as it is. It is your understanding that the District Court of the United States would not have concurrent jurisdiction in matters that are covered by this Law and Order Code? A. That is right.

Q. You could be mistaken about that, could you not? A. It is possible.

Witness excused.

Defendants rest.

The Court: Any rebuttal?

Mr. Allan: Yes. [354]

Whereupon

ALBERT E. STEPHENSON

was recalled in rebuttal and testified as follows:

Direct Examination

By Mr. Allan:

Q. Will you point out the fenced portion in relation to the Onstad cattle, on the range that we have been discussing here in relation to the Black-foot Indian country?

A. I will have to identify that from the plat.

Mr. Allan: Well, I will call Mr. Girard.

Witness excused.

Whereupon

CHARLES GIRARD,

a witness recalled in rebuttal, testified as follows:

Direct Examination

By Mr. Allan:

Q. Will you point on the map with reference to the plat here, the fenced portion of the land that was used by the Onstad cattle?

A. It is, 3610 here (Indicating).

Q. That is 3610 on exhibit two?

A. It takes in sections seventeen and eighteen; fenced in here (Indicating). There is a lot or two in there that is under farm, but the rest of that up in there; it is patented land.

Q. And how much of that land is fenced?

A. I would say two sections and a half, approximately.

Q. In relation to the Lewis land, to the Fred Lewis land, how much of that land is fenced?

A. All in Unit twenty-nine is under fence which is [355] the Fred Lewis Unit; they run cattle and horses, on Unit twenty-nine.

Q. And are there any particular Units that you have in mind that are in this vicinity?

A. Unit one eighteen is under fence.

Q. What about the land around Buffalo Lake?

A. The land around Buffalo Lake, the south boundary of Unit twenty-eight, twenty-seven, thirty-two, and one twenty-eight is fenced, the south boundary. Then the east boundary of one twenty-

(Testimony of Charles Girard.)

eight is fenced, and there is a fence between Unit twenty-seven and thirty-two running north and south. Unit one seventy-seven is under fence, and this hundred and thirteen, Unit eighty-one, Unit number two, Unit forty-five, part of Unit one sixty-six is fenced. I think that is about all I can recall offhand.

Cross-Examination

By Mr. McCabe:

Q. How many Units are there altogether in the Blackfeet Indian Reservation?

A. Well, under the new terms there would be some three hundred and twenty or three hundred and twenty-five, I think they are not all completed and we don't know for sure.

Q. And the only ones that have been fenced entirely around or part of them, are the Units you have enumerated, that you have spoken of?

A. There is some more land around, but I cannot recall it offhand that is under fence.

Q. But this land that is under fence, is further [356] removed from Unit number twelve, is it not?

A. This land along here, which is along the south boundary of number twenty-seven, twenty-eight and thirty-two one hundred and twenty-eight, which lies north of Unit twelve a mile and a half there is fenced and goes on south to the river from Unit twelve. The land along the river is fenced, the ranches on the Cut Bank Creek.

Q. And that is fenced on how many sides to the south boundary of sections twenty-seven,

(Testimony of Charles Girard.)

twenty-eight, thirty-two and one hundred and twenty-eight?

A. The fence starts here (indicating) on the north and south line between thirty-two.

Q. That is down to the south boundary of those units?

A. Yes, this is the Fred Lewis fence. The boundary between twenty-eight and twenty-nine is the Fred Lewis fence which goes down to the south end of unit twenty-nine.

Q. Is that a surrounding fence, or just fenced on one side?

A. Unit twenty-nine is fenced completely.

Q. And that is away up in township eleven?

A. Yes, in township thirty-five, range eleven.

Q. Range eleven? A. Yes.

Q. And this land involved in this action is all in townships nine and ten, thirty-four and thirty-five north, ranges nine and ten?

A. It is fenced here. (Indicating.)

Q. And that is just on one side of those units, the fence is on the south side of the units, thirty, [357] twenty-seven, thirty-two and one hundred and twenty-eight, is the only side fenced.

A. On Unit one hundred and twenty-eight there is some of it that is not under fence, but the greatest part of it is under fence.

Q. So that there is an open fence on some side?

A. It is not open fence, it is enclosed to the east, and south and west.

Q. When did you examine the fence last?

(Testimony of Charles Girard.)

A. I have been through that country for the last five years.

Q. In 1941, did you observe that fence as to its condition?

A. Some of that is new fence which has been put in in the last three or four years.

Q. So that in 1941, at the time the alleged trespass, there was a part of this that was not fenced at all?

A. This was all fenced here (indicating).

Q. Just on the south side and west side?

A. This fence has been there for some years.

Q. On the south and west sides?

A. Most of it on the east side has been there for some time.

Q. How many miles of fencing would you say there is on the east and south and west sides of those units, numbers twenty-eight, twenty-seven, thirty-two and one hundred and twenty-eight?

A. I haven't got it figured up, I would have to stop to figure it.

Q. Just approximately. Just give us an approximation? [358]

A. There must be thirty miles or more of fencing in there.

Q. And in 1941, did you ride all around that thirty miles of fence?

A. Well, I have been through the country for years. I live there. I know the country from one part to the other. I never made a special trip around to see how much fence was there.

(Testimony of Charles Girard.)

Q. So that whether or not that fence was all up at the time, in 1941 or not, you don't know?

A. There is bound to be some down, I guess.

Q. You don't know whether it was all kept up, or some of it came down?

A. I know some of these Units always kept their fence up, in order to keep stock out. Some of this is old fence around here (Indicating).

Mr. McCabe: May I ask this question, a question that I overlooked this morning?

The Court: Yes.

Q. Did you say that Mr. Connolly, this morning, had Swanson's cattle in 1942?

A. The cattle were out there, I never made any notes on it. I could have been wrong on the date, I don't have any notes on it.

Government rests.

The Court: How much time will you want to furnish briefs.

Mr. Allan: I would like to have at least thirty days after we receive the transcript to [359] furnish our brief.

The Court: We will make it thirty days on a side. If Mr. Allan is crowded he will be allowed more time, of course.

That is all.

[Endorsed]: Filed Sept. 20, 1944. [360]

Thereafter, on September 20, 1944, a Designation of Contents of Record on Appeal was duly filed herein, in the words and figures following, to-wit:

[361]

In the District Court of the United States
In and For the District of Montana
Great Falls Division

UNITED STATES OF AMERICA,

Plaintiff,

vs.

BIRAN CONNOLLY and DANIEL CONNOLLY,
Defendants.

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL OF DEFENDANTS BRIAN
CONNOLLY AND DANIEL CONNOLLY

Whereas, the defendants Brian Connolly, also known and referred to as Biran Connolly, and Daniel Connolly, have heretofore filed Notice of Appeal in the above entitled action to the United States Circuit Court of Appeals of the Ninth Circuit from the Judgment rendered and entered in the above entitled action on the 24th day of December, 1943:

Now Therefore, the said appellants do hereby designate the following portions of the record, proceedings and evidence to be contained in the Record of Transcript on Appeal of the above entitled cause on appeal and respectfully request same be incorporated in the said Transcript on Appeal, to-wit:

1. Plaintiff's Complaint.
2. Summons, and the Order of the Court to show cause, dated November 22, 1941.
3. Preliminary injunction.
4. Separate answer of Daniel Connolly.
5. Amended answer of Brian Connolly.
6. Motion of Plaintiff to strike parts and portions of the amended answer of Brian Connolly.
7. Order granting and allowing motion of Plaintiff to strike portions of amended answer of Brian Connolly. [362]
8. Petition for Order modifying injunction.
9. Order modifying injunction.
10. Transcript of the proceedings at the trial of said cause, including and embracing all testimony given and offered and all rulings of the Court and all exhibits offered in evidence at said trial.
11. Written opinion of the Court.
12. Court's Findings of Fact and Conclusions of Law.
13. Judgment.
14. Writ of Injunction.
15. Notice of Entry of Judgment.
16. Notice of intention of Daniel Connolly to move for a new trial.
17. Motion of Daniel Connolly for a new trial.
18. Notice of intention of Brian Connolly to move for a new trial.
19. Motion of Brian Connolly for a new trial.
20. Affidavit of Brian Connolly in support of motion for a new trial.
21. Order denying motions for a new trial.

22. Notice of Appeal.

23. Bond on Appeal.

24. Entry on Civil docket as to names of parties to whom Clerk mailed copies of Notice of Appeal and Bond on Appeal with date of mailing.

25. Designation of contents of record on appeal.

26. Please endorse respective dates of filing of the foregoing several proceedings in the above Court.

Dated this 20th day of September, 1944.

E. J. McCABE

S. J. RIGNEY

Attorneys for Appellants Brian Connolly and Daniel Connolly. [363]

[Title of District Court and Cause.]

AFFIDAVIT OF MAILING

United States of America,
State of Montana,
County of Cascade—ss.

E. J. McCabe, being first duly sworn, upon his oath deposes and says:

That he is one of the attorneys of record for the defendants in the above entitled action and resides and maintains his office at Great Falls, Montana; and

That John B. Tansil, United States District Attorney for the District of Montana is the attorney for the plaintiff in said action and resides and maintains his office at Billings, Montana;

That affiant on the 20th day of September, 1944, placed a true copy of the annexed Designation of Contents of Record on Appeal of Defendants Brian Connolly and Daniel Connolly in a securely sealed envelope addressed to said John B. Tansil, Esq., United States District Attorney, Billings, Montana, and deposited said envelope, with postage thereon fully prepaid, in the United States Post Office at Great Falls, Montana, for transmission and delivery in due course of mail to the above named attorney for plaintiff.

E. J. McCABE

Subscribed and sworn to before me this 20th day of September, 1944.

[Seal] PEARLIE E. LAULO

Notary Public for the State of Montana. Residing
at Great Falls, Montana.

My commission expires April 28, 1945.

[Endorsed]: Filed Sept. 20, 1944. [364]

Thereafter, on September 23, 1944, a Stipulation to Amend Bond on Appeal was duly filed herein, in the words and figures following, to-wit: [365]

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated and agreed by and between the parties to the above entitled action by and through their respective attorneys that the annexed certificate of L. A. Boe, as deputy assessor of

Glacier County, Montana, may be attached to the bond on appeal heretofore filed in the above entitled action by the Defendants and Appellants, Brian Connolly, also known as Biran Connolly, and Daniel Connolly, as a substitute and corrected certificate in lieu of the certificate executed by Assessor Edward Murphy and for the purpose of correcting an error in value of property of Jack Loring stated in said certificate of Assessor Edward Murphy.

Dated this 22nd day of September, 1944.

E. J. McCABE

S. J. RIGNEY,

Attorneys for defendants and
appellants.

JOHN B. TANSIL

United States Attorney.

By MERLE C. GROENE

Assistant United States
Attorney. [366]

State of Montana,
County of Glacier—ss.

I, L. A. Boe, do hereby certify and declare, as follows, to-wit:

That I am the duly appointed, qualified and acting Deputy Assessor of Glacier County, Montana, and that Ida Johnson Connolly and Jack Loring, the Sureties named in the within and foregoing Bond on Appeal, appear as owners of real estate and personal property upon the assessment and tax records of Glacier County, Montana, in value as

follows: Ida Johnson Connolly, the sum of Eleven Hundred Twenty (\$1120.00) Dollars, Jack Loring, the sum of Thirty Eight Hundred and Thirty-five (\$3835.00) Dollars.

In Witness Whereof, I hereunto subscribe my name as Deputy Assessor aforesaid on this 20th day of September, 1944.

L. A. BOE

Subscribed and sworn to before me this 20th day of September, 1944.

[Seal] S. J. RIGNEY

Notary Public for the State of Montana, residing at Cut Bank.

My commission expires Feb. 6, 1945.

[Endorsed]: Filed Sept. 23, 1944. [367]

In the District Court of the United States
In and For the District of Montana
Great Falls Division

CLERK'S CERTIFICATE TO TRANSCRIPT
OF RECORD

United States of America,
District of Montana—ss.

I, H. H. Walker, Clerk of the United States District Court for the District of Montana, do hereby certify and return to The Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of 368 pages, numbered consecutively from 1 to 368

inclusive, constitutes a full, true and correct transcript of all portions of the record in case number 305, United States of America vs. Brian Connolly and Daniel Connolly, designated by the parties as the record on appeal therein, as appears from the original records and files of said court in my custody as such Clerk.

I further certify that the costs of said transcript amount to the sum of Sixty and 40/100ths (\$60.40) and have been paid by the appellant.

Witness my hand and the seal of said court at Great Falls, Montana, this 4th day of October, A. D. 1944.

[Seal]

H. H. WALKER,

Clerk, U. S. District Court,
District of Montana.

By C. G. KEGEL
Deputy.

[Endorsed]: No. 10890. United States Circuit Court of Appeals for the Ninth Circuit. Brian Connolly and Daniel Connolly, Appellants, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Montana.

Filed October 9, 1944.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10890

BIRAN CONNOLLY and DANIEL CONNOLLY,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

DESIGNATION OF PARTS OF THE RECORD
TO BE PRINTED AND STATEMENT OF
POINTS ON WHICH THE APPELLANT
BIRAN CONNOLLY INTENDS TO RELY
ON APPEAL

To the Clerk of the United States Circuit Court of
Appeals for the Ninth Circuit:

I.

You will please be advised that the appellant Biran Connolly, also known as Brian Connolly, does hereby designate for printing in the appeal of the above case the entire transcript of the record forwarded to you by the Clerk of the United States Court for the District of Montana in the above entitled action, together with this designation of parts of the record to be printed and the statement of points on which the appellant intends to rely on appeal filed in the above entitled action on appeal.

II.

The above named appellant Biran Connolly, also

known as Brian Connolly, does hereby make and file this statement of points on which he intends to rely on appeal of the above action: 1. The complaint in this action, in brief, charges the two appellants, defendants below, members of the Blackfeet Indian tribe and wards of the United States, with willfully causing and allowing approximately two hundred sixty head of cattle and seventy five head of horses owned by them to trespass upon certain allotted lands and premises, particularly described, of the Blackfeet Indian Reservation in Montana. Compensatory damages for injury to lands and grasses growing thereon and injunctive relief was prayed.

The amended answer of appellant Biran Connolly denied the trespass and for further affirmative defenses alleged substantially the following:

(a) That he owned an "on and off" grazing permit from appellee which in effect permitted him to graze 255 head of cattle for a twelve month period or 510 head of cattle for a six month period on lands within said Indian Reservation and that he in fact grazed not to exceed 309 head on such land for not more than six months, and that during the time alleged in the complaint he had other additional lands in his possession and control for pasturing and grazing his livestock and if any of his livestock entered upon other land on the reservation same did so without his knowledge, and in any event the total number of such livestock did not exceed the number defendant had the right to graze upon the said Indian Reservation.

(b) That the lands described in the complaint as having been trespassed upon are open unfenced lands chiefly valuable for grazing purposes and that he had a vested right, in common with all other members of the Blackfeet Tribe, to permit livestock owned individually to graze upon all unfenced land of the Blackfeet Indian Reservation by virtue of the treaty of 1855 made between the United States and the Blackfeet Indian Tribe and that such grazing right in members of the tribe has been at all times since recognized by the Appellee and said Tribe until the commencement of the above action.

(c) That from time immemorial there has been a well established custom recognized as law among the members of the Blackfeet Indian Tribe of each tribal member having a vested right of allowing his livestock to roam at large and graze upon the unfenced lands to which the tribe claimed the right of occupancy and that such right is a valuable one, the exercise of which is guaranteed to said Biran Connolly as a member of said tribe, by the constitution, treaties and laws of the United States.

The trial court, upon motion of the Appellee, struck from the amended answer the allegations showing it was the custom and practice of the United States and permittees under "on and off" grazing permits of the character of the Biran Connolly grazing permit to increase the number of livestock grazed by the permittee proportionately as the actual grazing period of livestock was decreased in each twelve month period, and the trial

court also struck from said amended answer the allegations of the existence of the right of Biran Connolly guaranteed by the said Treaty of 1855 and struck the allegations of the existence of the long established custom among the Blackfeet Indians, recognized as a tribal law, that any tribal member had a vested right to allow his livestock to roam at large and graze upon unfenced lands to which the Blackfeet Indian Tribe had the right of occupancy. At the trial the lower court would not permit appellant to introduce any evidence of the stricken allegations and therefore the said appellant will urge on appeal that the action of the trial court in striking said allegations and in refusing evidence in support thereof to be introduced at the trial committed prejudicial error.

2. The complaint alleged a willful trespass of livestock owned by appellants. The evidence showed that at times some livestock bearing Biran Connolly's brand was seen upon the lands alleged as being allotted lands, and at times some livestock bearing Daniel Connolly's brand was seen upon the land. The evidence failed to show that such livestock were intentionally driven or intentionally allowed by such persons to graze upon the allotted lands, in fact the evidence is uncontradicted that when informed that livestock owned by appellant were on allotted land appellant removed same and that appellant instructed his children to ride the range every day and keep his livestock on his own range land and to return immediately any straying livestock to his own range and that both appellant

and children followed this practice. Appellant will urge on appeal that there was a failure of proof of the allegations of the complaint.

3. No place in the complaint indicates that the Appellee was seeking a judgment of penalty for trespass under the Act of March 1, 1901, ch. 676, Sec. 37, 25 U.S.C.A. 179, but the court in an action seeking injunctive relief for willful trespass and compensatory damages rendered judgment against Appellant for a penalty of \$258.00 notwithstanding the evidence failed to show 258 head of Appellant's livestock had been driven or conveyed to feed upon land belonging to an Indian or Indian Tribe without the consent of such Tribe as is expressly required by said section. The Appellant will urge that such judgment is contrary to law and the evidence in that the action essentially was one for equitable relief and compensatory damages and not for punishment by a penalty and that the evidence will not sustain a judgment for a penalty against Appellant.

4. That the judgment in part imposes a penalty upon Appellant for livestock owned according to the evidence by a co-defendant, Daniel Connolly, and is contrary to law.

5. That the evidence is wholly insufficient to sustain the judgment for an injunction or for the recovery of money or costs because no willful trespass or threatened trespasses by Appellant were shown and judgment for a penalty was imposed in an action brought for equitable relief.

6. That under the Wheeler-Howard Act and

the constitution and by-laws of the Blackfeet Indian Tribe and the code of laws duly adopted by said Tribe the Appellant was not guilty of any trespass.

7. That Appellant was led by the complaint in the action and was advised by his attorney that the action was equitable in character and not for a penalty and Appellant was not entitled to ask for jury trial and Appellant was thereby deprived of his right to exercise the privilege of asking for a jury to try the issues of fact in an action to enforce a penalty under the pertinent statute of the United States.

8. That each and all of the trial court's Findings of Fact numbered III providing "that the lands and premises, on which defendant, Brian Connolly, had said grazing rights and privileges, were in no wise involved or made the subject of this action" is contrary to the evidence and the law.

9. That each and all of the trial court's Findings of Fact numbered IV, V, VI and VII are contrary to the evidence and the law.

10. That each and all of the trial court's conclusions of law numbered 1, 2, 3 and 4 are contrary to the evidence and the law.

11. That the judgment of the trial court is unsupported by the pleadings and the evidence in the case.

12. That the Appellant suffered prejudicial error by the trial court's failure to grant his motion for a new trial wherein and whereby the various legal propositions herein above stated were called

to the lower court's attention to enable a correction of the manifest prejudicial errors committed by the court.

III.

By filing this statement of points the Appellant, Biran Connolly, in said action does not intend to waive the right to urge error upon appeal any of the rulings or findings of the trial court resulting in a judgment in said cause in favor of the plaintiff and against the defendant.

Dated this 18th day of October, 1944.

E. J. McCABE

S. J. RIGNEY

Attorneys for Appellant

Biran Connolly.

(Affidavit of Service attached.)

[Endorsed]: Filed Oct. 23, 1944. Paul P. O'Brien, Clerk.

[Title of District Court and Cause.]

DESIGNATION OF PARTS OF THE RECORD
TO BE PRINTED AND STATEMENT OF
POINTS ON WHICH THE APPELLANT
DANIEL CONNOLLY INTENDS TO
RELY ON APPEAL

To the Clerk of the United States Circuit Court of
Appeals for the Ninth Circuit:

I.

You will please be advised that the appellant

Daniel Connolly does hereby designate for printing in the appeal of the above case the entire transcript of the record forwarded to you by the Clerk of the United States Court for the District of Montana in the above entitled action, together with this designation of parts of the record to be printed and the statement of points on which the appellant intends to rely on appeal filed in the above entitled action on appeal.

II.

The above named appellant Daniel Connolly does hereby make and file this statement of points on which he intends to rely on appeal of the above entitled action:

1. The complaint in this action, in brief, charges the two Appellants, defendants below, members of the Blackfeet Indian Tribe and wards of the United States, with willfully causing and allowing approximately two hundred sixty head of cattle and seventy five head of horses owned by them to trespass upon certain allotted lands and premises, particularly described, of the Blackfeet Indian Reservation in Montana. Compensatory damages for injury to lands and grasses growing thereon and injunctive relief was prayed.

The answer of Appellant Daniel Connolly denied the alleged trespass.

2. The complaint alleged a willful trespass of livestock owned by Appellants. The evidence showed that at times some livestock bearing Biren Connolly's brand was seen upon the lands alleged as being allotted lands, and at times some livestock

bearing Daniel Connolly's brand was seen upon the land. The evidence failed to show that such livestock were intentionally driven or intentionally allowed by such persons to graze upon the allotted lands, in fact the evidence is uncontradicted that when informed that livestock owned by Appellant were on allotted land Appellant removed same and that Appellant will urge on appeal that there was a failure of proof of the allegations of the complaint.

3. No place in the complaint indicates that the Appellee was seeking a judgment of penalty for trespass under the Act of March 1, 1901, ch. 676, Sec. 37, 25 U.S.C.A. 179, but the court in an action seeking injunctive relief for willful trespass and compensatory damages rendered judgment against Appellant for a penalty of \$258.00 notwithstanding the evidence failed to show 258 head of Appellant's livestock had been driven or conveyed to feed upon land belonging to an Indian or Indian Tribe without the consent of such Tribe as is expressly required by said section. The Appellant will urge that such judgment is contrary to law and the evidence in that the action essentially was one for equitable relief and compensatory damages and not for punishment by a penalty and that the evidence will not sustain a judgment for a penalty against Appellant.

4. That the judgment in part imposes a penalty upon Appellant for livestock owned according to the evidence by a co-defendant, Biran Connolly, and is contrary to law.

5. That the evidence is wholly insufficient to sustain the judgment for an injunction or for the recovery of money or costs because no willful trespass or threatened trespasses by Appellant were shown and judgment for a penalty was imposed in an action brought for equitable relief.

6. That under the Wheeler-Howard Act and the constitution and by-laws of the Blackfeet Indian Tribe and the code of laws duly adopted by said Tribe the Appellant was not guilty of any trespass.

7. That Appellant was led by the complaint in the action and was advised by his attorney that the action was equitable in character and not for a penalty and Appellant was not entitled to ask for jury trial and Appellant was thereby deprived of his right to exercise the privilege of asking for a jury to try the issues of fact in an action to enforce a penalty under the pertinent statute of the United States.

8. That each and all of the trial court's Findings of Fact numbered III providing "that the lands and premises, on which defendant, Brian Connolly, had said grazing rights and privileges, were in no wise involved or made the subject of this action" is contrary to the evidence and the law.

9. That each and all of the trial court's Findings of Fact numbered IV, V, VI and VII are contrary to the evidence and the law.

10. That each and all of the trial court's conclusions of law numbered 1, 2, 3 and 4 are contrary to the evidence and the law.

11. That the judgment of the trial court is unsupported by the pleadings and the evidence in the case.

12. That the Appellant suffered prejudicial error by the trial court's failure to grant his motion for a new trial wherein and whereby the various legal propositions herein above stated were called to the lower court's attention to enable a correction of the manifest prejudicial errors committed by the court.

III.

By filing this statement of points the Appellant, Daniel Connolly, in said action does not intend to waive the right to urge error upon appeal any of the rulings or findings of the trial court resulting in a judgment in said cause in favor of the plaintiff and against the defendant.

Dated this 18th day of October, 1944.

E. J. McCABE

S. J. RIGNEY

Attorneys for Appellant
Daniel Connolly.

(Affidavit of Service attached.)

[Endorsed]: Filed Oct. 23, 1944. Paul P.
O'Brien, Clerk.

No. 10890

United States
Circuit Court of Appeals
For the Ninth Circuit

BRIAN CONNOLLY and DANIEL CONNOLLY,
Appellants,
vs.
UNITED STATES OF AMERICA,
Appellee.

Brief of Appellant

E. J. McCabe,
S. J. Rigney,
Attorneys for Appellants.

Upon Appeal from the District Court of the United
States for the District of Montana.

Filed

FILED

DEC 28 1944

..... Clerk

PAUL P. O'BRIEN,
CLERK



United States
Circuit Court of Appeals
For the Ninth Circuit

BRIAN CONNOLLY and DANIEL CONNOLLY,
Appellants,
vs.
UNITED STATES OF AMERICA,
Appellee.

Brief of Appellant

E. J. McCabe,
S. J. Rigney,
Attorneys for Appellants.

Upon Appeal from the District Court of the United
States for the District of Montana.

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JURISDICTION

This is an appeal from a judgment of the District Court of the United States for the District of Montana, Great Falls Division, granting injunctive relief and damages in favor of appellee, in a cause wherein the appellee, United States of America, was plaintiff, and Brian Connolly (also known as Biran Connolly) and Daniel Connolly, two members of the Blackfeet Indian Tribe, residing within the Blackfeet Indian Reservation in Montana, were defendants (R. 46, 51, 79). The judgment, in effect, enjoined the appellants from causing or permitting livestock of the appellants, or of either of them, to enter upon certain particularly described lands located within said Reservation (R. 53), and awarded the appellee a money judgment of \$1.00, nominal damages for alleged trespass of defendants' livestock upon said lands, and the further sum of \$258.00 by way of a penalty against the defendants under Section 179, Title 25, United States Code (R. 54). The jurisdiction of the United States District Court was predicated upon the fact the United States of America was the plaintiff (R. 2) in that Court (Section 41, Title 28, United States Code Annotated, subd. first).

The appellate jurisdiction of the United States Circuit Court of Appeals is found in Section 225, Title 28, United States Code Annotated (first paragraph, Judicial Code, Section 128, as amended), wherein the Circuit Court of Appeals is given jurisdiction in all cases save those in which there is a direct appeal to

the Supreme Court of the United States. No such direct appeal to the Supreme Court is permissible in this case (section 345, Title 28 U. S. C. A.).

STATEMENT OF THE CASE

The complaint filed November 22, 1941, in the District Court by the appellee, plaintiff below (R. 2-14), substantially alleges that from about August 6, 1941 to November 22, 1941, appellants, citizens of the State of Montana (R. 3) and Blackfeet Indian wards of the United States, and living on the Blackfeet Indian Reservation in Montana (R. 3, 6), “drove, or caused to be driven, drifted and allowed to drift, and herded upon the allotted lands and premises of said Blackfeet Indian Reservation,” embracing fourteen and one quarter sections of land, particularly described, and “other lands and premises within the confines” of said reservation (not otherwise described), approximately 260 head of cattle and approximately 75 head of horses, causing said cattle and horses to graze and pasture upon said lands and to eat and destroy the grasses, feed, forage and herbage growing thereon (R. 6, 7) and that the “driving, drifting and herding of said cattle and horses” was done “intentionally, knowingly, willfully, and without consent, and in open defiance of the plaintiff” and without said defendants having any “permit or other right or authority whatsoever” to so do and that defendants “have at all times hereinbefore mentioned ever since have been and now are driving, drifting and herding cattle and horses on and upon said lands

and premises” without the consent of the plaintiff herein, its officers and agents, and without the consent and against the wishes of said Indians of the Blackfeet Indian Reservation” and without paying for the privilege of grazing and herding said cattle upon said allotted lands and premises. It is further alleged that the 260 head of cattle grazed upon said lands from August 6, 1941, to the date of filing the complaint, and damaged the grasses, feed, forage and herbage thereon in the sum of \$1,341.00, and that “plaintiff has repeatedly requested” the defendants on divers occasions to remove said cattle from said lands but refused to do so and continue to drive, drift, allow to drift, herd and graze said cattle and horses on said lands. The insolvency of defendants and necessity of multiplicity of suits unless the defendants’ acts be enjoined, and difficulty of ascertainment of future damages are alleged and that defendants will continue the acts complained of and will not remove their cattle and horses from the lands unless compelled to do so (R. 6-11). The rated carrying capacity of the range of the Blackfeet Reservation is alleged to be 24 acres for one head of cattle a year and 36 acres for one head of horses, based on a ten months yearly period (R. 11). It is also alleged that plaintiff has no adequate remedy “save in a Court of equity.” The complaint prays \$1,341.00 actual damages, injunction relief, costs, and for “such other and further relief as to the Court may seem meet and equitable” (R. 11). No suggestion of imposition or

recovery of a penalty against the defendants is made in the complaint.

The complaint expressly admits that defendant Brian Connolly is entitled to graze 255 head of cattle upon 8100 acres of land on the Blackfeet Indian Reservation, particularly described (R. 5, 6).

The answer of Daniel Connolly (R. 22, 23), admitted the allegations of paragraphs I to IV, inclusive, and IX of the complaint, pertaining to the Court's jurisdiction, boundaries of the Blackfeet Reservation, the defendants' residence, citizenship, and membership in Blackfeet Tribe, title in plaintiff and right to possession and control through its wards the Blackfeet Indian Tribe to the lands comprising said reservation, the right of his co-defendant to graze the 8100 acres of land admitted by plaintiff, and the livestock carrying capacity of the land of said reservation (R. 2-6, 11, 22). The answer denied the facts alleged in paragraphs V to VIII, inclusive, and X of the complaint pertaining to alleged acts of trespass, damages, insolvency of defendants, necessity of multiplicity of suits or injunction, and inadequacy of remedy (R. 6-11, 22).

The amended answer of Brian Connolly admitted the allegations of paragraphs I to III, IV and IX of the complaint pertaining to the Court's jurisdiction, defendants' citizenship, residence, membership in Blackfeet Tribe, and right of said defendant to graze land described in paragraph IV (R. 2-6, 11, 23, 24), and alleges he had grazing privileges on additional

lands (R. 24).

Paragraphs V to VIII, inclusive, and IX of the complaint substantially alleging trespass of cattle of defendants, damages, refusal of defendants to remove their livestock, continuity and future trespass, insolvency of defendants, necessity of multiplicity of suits or injunction, irreparable damage, and nonexistence of remedy save in a court of equity (R. pp. 6-11) are either specifically denied or by qualified admissions and general denials are in effect denied by Brian Connolly (R. 23-26, 27). The cattle and horse carrying capacity of the range on the Blackfeet Reservation of 24 acres for one head of cattle and 36 acres for one horse based on a ten month yearly period alleged is admitted by Brian Connolly (R.11,26).

The amended answer of Brian Connolly, as originally filed also pleaded three affirmative defenses, to-wit:

1. That he had an "on and off" written grazing permit and agreement entered into between plaintiff and Fred Choquette and appellant, for a term of from November 1, 1940 to April 30, 1943, whereby he had the right to graze 5780 acres of land and described in paragraph IV of plaintiff's complaint and that said agreement contemplated a grazing period of twelve months during each year, and that it had been the recognized custom and practice for more than twenty years between the plaintiff and by the permittees of the plaintiff grazing livestock on said reservation that permittees, in lieu of grazing livestock upon the

lands during a continuous twelve months period of the maximum number of livestock specified, had the absolute right to graze a greater number of livestock for a shorter period, such right of increase to be computed by adding to the number specified in the agreement proportionately and accordingly as the period of actual grazing bore to the total period of twelve months. That said Connolly had the right to graze a total of 510 head of livestock for a six month period on the lands described in the permit and at no time did he actually graze on said permit lands more than 309 head and at no time did he graze an excess of 255 head of cattle or the equivalent as above set forth on said permit land (R. 27-29). This permit appears as "Plaintiff's Exhibit No. 1" on pages 89-121 of the transcript of the record. In addition to said permit lands the answer alleges he had other lands in his possession and control for pasturing and grazing livestock and that if at any time livestock in the possession or control of Brian Connolly grazed, or pastured, or drifted, or were herded upon the lands complained of in the complaint same was done without knowledge of defendant, and in any event the number did not exceed the number he was entitled to graze (R. 29).

2. That the lands described in paragraphs IV and V are open unfenced lands chiefly suitable for grazing livestock and that Brian Connolly had the vested right in common with all members of the Blackfeet Indian Tribe to permit cattle, horses and other live-

stock owned individually by members of the tribe to roam at large and graze upon all unfenced lands situate within the Blackfeet Reservation, and that such right was recognized by plaintiff and accorded the Blackfeet Tribe by treaty in the year 1855. That during all of the period from the time of making said treaty the said tribe have believed and interpreted such treaty as conferring such rights upon the members of the tribe and have accordingly exercised such right with the knowledge and consent of the plaintiff and the tribe and such members are still exercising such rights with full knowledge and acquiescence of the plaintiff, and that the institution of the present action is the first time that such right has ever been attempted to be denied to a member of that tribe (R. 29, 30).

3. That from time immemorial there has existed among the Indians of the Blackfeet Tribe the long and well established custom of each member of the tribe having the absolute vested right of allowing livestock owned by such member to roam at large and graze upon the lands to which the tribe claimed the right of occupancy without interference by the tribe or members thereof, and that such custom has been observed by the tribe as one of the laws of the tribe binding upon the members of the tribe collective and individually. That as a member of the tribe he is entitled to permit his livestock to range upon the "unfenced lands" to which the tribe claimed rights of occupancy and such right is a valuable incorporeal right in Brian Connolly and the exercise of which is guar-

anted to him under the constitution, treaties, and laws of the United States (R. 30, 31).

The plaintiff moved to strike from the amended answer, as immaterial and redundant, all of the portion of paragraph I of Brian Connolly's further answer to the complaint relating to the custom and practice of plaintiff and permittees, under permits of the character described, to increase number of stock grazed proportionate to the reduction of period of time of actual grazing, and relating to his grazing of livestock under his permit (R. 32, 33); moved to strike all of the matters in paragraphs II and III of said defendant's further answer relating to his right of grazing and pasturage under the treaty of 1855 between plaintiff and the Blackfeet Tribe and the exercise of such treaty right at all times since by members of the tribe with the knowledge, acquiescence and consent of plaintiff and the present action being the first time a denial of such right has been attempted (R. 29, 30, 33). The plaintiff also moved to strike as redundant, immaterial and impertinent all of the matter appearing in paragraph I of the third affirmative defense of Brian Connolly's amended answer relating to the custom of the Blackfeet Tribe, recognized as law by that tribe, to permit individually owned livestock of tribal members to range upon the open unfenced land to which it claimed the right of occupancy (R. 31, 33).

The District Court granted plaintiff's motion to

strike in its entirety (R. 34). At the trial Brian Connolly endeavored to testify relative to the custom among the Blackfeet Indians running their stock at large on the Blackfeet Indian Reservation and the Court refused admission of such evidence on the ground that such custom was not in issue by reason of the plaintiff's motion to strike allegations respecting same from the Brian Connolly answer having been sustained by the Court (R. 263).

Trial of the cause was had before the Court without a jury and submitted to the Court for decision (R. p. 85—362). The evidence received and rulings of the trial court on admission of evidence will be discussed fully in that portion of the within brief devoted to argument of the various legal questions presented to this Court.

Thereafter the trial court filed written decision (R. 39-44), to the effect that plaintiff was entitled to recover a penalty of \$258.00 under Section 179 of Title 25, United States Code Annotated, the further sum of \$1.00 nominal damages only, and injunctive relief. Findings of fact and conclusions of law in favor of the plaintiff were given (R. 45-51), and judgment rendered in favor of plaintiff and against **both defendants** for the sum of \$258.00 penalty under Section 179, 25 U. S. C. A., and a permanent injunction (R. 51-55).

The appellants moved, separately, for new trials (R. 57-70). The motions for a new trial were denied

(R. 78, 79), and appeal taken (R. 79-85).

QUESTIONS PRESENTED

The questions presented in this appeal may be briefly stated as follows:

First. Did Brian Connolly and Daniel Connolly willfully cause or permit their cattle to unlawfully enter and graze upon land allotted to Indian allottees within the Blackfeet Reservation?

Second. Was the trial court's judgment for recovery by plaintiff of the penalty of \$258.00 warranted or proper in this action?

Third. Was the judgment of the trial court allowing permanent injunctive relief against defendants proper in this cause?

Fourth. Was the evidence received during the trial in the lower court sufficient to support the findings of fact, conclusions of law and judgment of the District Court?

Fifth. Was the action of the trial court proper in granting appellee's motion to strike the specified allegations of fact of the amended answer of appellant Brian Connolly objected to by appellee?

Sixth. Was offered evidence of defendant concerning the custom among the Blackfeet Indians relative to running their stock at large on the reservation correctly excluded by the trial court?

Seventh. Was the redirect examination by witness Brian Connolly unduly restricted by refusal of the trial court to permit him to be examined for the

purpose of showing that a purported resolution of the Blackfeet Tribal Council relative to free grazing on the Blackfeet Reservation (Plaintiff's Ex. 11, R. 264-268), introduced in evidence as a part of the cross examination of the witness, had not been adopted by said tribal council and was not a valid resolution of such council?

SPECIFICATIONS OF ERROR

1. Because there was no sufficient evidence in the record, the trial court erred in making findings of fact No. IV (R. 46, 47), as follows:

“That for many months prior to and including the date of the filing of the plaintiff's complaint, the defendants, Brian Connolly and Daniel Connolly, willfully drove and otherwise conveyed livestock of horses and cattle and willfully caused and allowed their said livestock to range and feed on lands and premises belonging to their Indian neighbors on said Blackfeet Indian Reservation and to trespass on the lands of their said Indian neighbors on said Blackfeet Indian Reservation, without the consent of said Indians, and in open defiance of the plaintiff, its officers and agents, and without said defendants ever having had at any said time any permit or other right or authority whatsoever to drive and herd, or otherwise convey, said livestock of said defendants on and upon the Blackfeet Indian Reservation.”

2. Because there was no sufficient evidence in the record and because there was no foundation in the

pleadings for same the trial court erred in making finding of fact No. V (R. 47) as follows:

“That the defendants are subject to the penalty provided for by Section 179, Title 25, United States Code, in the amount of \$1.00 per head for the livestock of said defendants that said defendants drove and conveyed to range and feed on the lands and premises belonging to their Indian neighbors on said Blackfeet Indian Reservation without the consent of said Indians, as follows, to-wit: the 25 head of horses in willfull trespass on July 25, 1941, the 48 head of horses and 45 head of cattle in willfull trespass on August 8, 1941, the 32 head of horses in such trespass on August 13, 1941, and the 36 head of horses and 22 head of cattle in willfull trespass on October 21, 1941—making the total penal sum of \$258.00.”

3. Because there was insufficient evidence in the record the trial court erred in making finding of fact No. VI (R. 48) as follows:

“That it is true that the defendants, Brian Connolly and Daniel Connolly, one and both, willfully refused to remove their trespassing cattle and horses from the lands and premises of their Indian neighbors on said Blackfeet Indian Reservation, and said defendants willfully continued to allow their said livestock to trespass upon said lands and premises, and said defendants permitted their said livestock to eat and destroy the grasses, feed, herbage and other forage growing thereon, and to trample and destroy the same, and said defendants, one and both, refused to remove their said livestock when requested and upon the instructions of authorized officers of the United States Indian Service, when injury was being done to the range of said Blackfeet Indian Reservation, by

reason of the improper handling of said livestock by said defendants, and said defendants would not remove their said livestock from said Indian lands and premises of said Blackfeet Indian Reservation until compelled so to do.”

4. Because there was insufficient evidence in the record the trial court erred in making finding of fact No. VII (R. 48) as follows:

“That the plaintiff, by reason of the foregoing, has no plain, adequate and complete remedy at law herein against the repeated trespassing of the defendants and no remedy whatsoever, save on the equity said of this Court, where such willful trespasses are cognizable.”

5. The trial court erred in making that part of fact No III (R. 46) to the effect that the lands and premises on the Blackfeet Indian Reservation upon which Brian Connolly had grazing rights and privileges were in no wise involved in or made the subject of the action for the reasons that said part of the finding is contrary to the pleadings and the evidence.

6. Because of the insufficiency of the evidence and lack of proper pleading to support same the trial court erred in the court’s conclusions of law Nos. 1, 2, 3 and 4, to the effect that plaintiff is entitled to judgment for the penalty provided by Section 179, Title 25, United States Code, nominal damages, plaintiff’s costs and a perpetual injunction against the defendants (R. 49, 50).

7. Because there was no sufficient evidence in the record the trial court erred in rendering and enter-

ing judgment in favor of the plaintiff and against the defendants (R. 51-55).

8. The trial court erred in granting the motion of plaintiff to strike the allegations of the amended answer of Brian Connolly pertaining to the custom and practice of the plaintiff and grazing permittees upon lands on the Blackfeet Indian Reservation to increase the number of livestock grazed upon permit land proportionately as the trial grazing period was reduced by the permittee (R. 27, 28, 32, 34).

9. The trial court erred in granting plaintiff's motion to strike the allegations of the amended answer of defendant Brian Connolly relating to his rights as a member of the Blackfeet Tribe to permit livestock to roam at large and graze upon unfenced lands situate within the Blackfeet Indian Reservation by virtue of the treaty of 1855 between the United States and the Blackfeet Indian Tribe and the exercise of such rights by members of said tribe at all times since with the full knowledge of the plaintiff (R. 30, 33, 34).

10. The trial court erred in granting plaintiff's motion to strike from the amended answer of Brian Connolly the allegations pertaining to the long and well established custom of the Blackfeet Tribe of members of that tribe having the vested right to allow individually owned livestock to roam at large and graze upon unfenced lands to which the Blackfeet Tribe had the right of occupancy (R. 31, 33, 34).

11. The trial court erred in refusing to permit witness Brian Connolly testify to a custom of the Blackfeet Indians relative to running their livestock at large on the Blackfeet Indian Reservation (R. 263) as follows:

Q. Do you know whether or not there has been a custom among the Blackfeet Indians on the Blackfeet Reservation relative to running their stock at large on that Reservation?

Mr. Allan: Again renewing the objection. We object to any testimony as to custom because the matter is now covered by regulations.

The Court: I don't think that is an issue here. I think we threshed that out on your motion to strike.

Mr. Allan: Yes, on my motion to strike."

12. The trial court erred by restricting the redirect examination of witness Brian Connolly with reference to a purported copy of a resolution of the Blackfeet Indian Tribal Council introduced in evidence as "Plaintiff's Exhibit No. 11" during cross examination of the witness (R. 264-269), when on redirect examination counsel for defendants sought to examine him with reference to said resolution (R. 287) as follows:

"Q. Now, you have been examined on cross examination about a resolution relative to free grazing on the Blackfeet Indian Reservation. Will you please state whether or not that resolution, whether it passed or not, has been a subject of discussion with the Blackfeet Tribal Council?

A. Yes sir.

Mr. Allan: We object to such resolution. The resolution speaks for itself, and it is the best evidence.

The Court: Well, I think so. The resolution was passed first, and was revoked.

Mr. McCabe: We are going to show there was a dispute with some members of the Council; it was never adopted, and some said it was, and in order to obviate that question there was a resolution introduced repealing that resolution.

The Court: Objection sustained as the matter is going into the proceedings of the Council."

13. The trial court erred in denying the motion of Brian Connolly for a new trial (R. 57-65, 78, 79).

14. The trial court erred in denying the motion of Daniel Connolly for a new trial (R. 65-70, 78, 79).

ARGUMENT

Summary.

The argument herein may be abridged to the following legal propositions:

(a) The evidence of plaintiff failed to establish a willful intentional or a willful permissive continuous trespass of defendants' livestock upon the lands described in the complaint and failed to establish any damages, or insolvency of defendants or right to injunctive relief, all material allegations of the complaint, and consequently there was a fatal failure of proof.

(b) The imposition of a judgment for a penalty for alleged trespassing livestock was without any supporting pleading or evidence and contrary to the rule that a court in giving relief of an equitable char-

acter will not enforce a punitive penalty.

(c) The striking of the trial court of allegations of treaty rights of defendant and allegations of long established custom of the Blackfeet Indians as to straying and roaming of livestock on unfenced tribal lands and denial of admission of evidence thereof by defendants, in effect, deprived them of substantial vested property rights as members of the Blackfeet Indian Tribe.

(d) The Blackfeet Tribe having adopted a law requiring a driving or herding of livestock upon unfenced or cultivated land to constitute an actionable trespass controls the case at bar by reason of their being no Federal legislation other than Section 179, Title 25 U.S. C. A., which section is not applicable in this action.

(e) The Wheeler-Howard Act of June 18, 1934, does not abrogate the powers of the Blackfeet Tribe nor does it confer upon the Secretary of the Interior the congressional power of legislation to define trespass of livestock nor fix a penalty nor set aside or annul the tribal laws and customs as between members of that tribe.

(f) The trial court unduly and prejudicially restricted cross examination on behalf of defendants.

(g) The effect of the money judgment for the statutory penalty was to deprive defendant Brian Connolly of his right to have that issue submitted to a jury.

1. The evidence was and is insufficient to sustain the judgment.

The substance of plaintiff's complaint is that the defendants willfully drove or caused or permitted approximately 260 head of cattle and 75 head of horses owned by them to enter and graze upon 15 sections and an additional 40 acre tract of "allotted lands and premises" particularly described as to section, range and township numbers and upon "other lands and premises" not particularly described, for the continuous period of time from about August 6, 1941, to and including November 22, 1941 (date of filing complaint), and would continue to so do; that repeated demands made by plaintiff for the removal of said livestock had been refused by defendants; that said defendants were insolvent, that actual damages of \$1341.00 had been suffered by plaintiff and absence of adequate remedy "save in a court of equity" (R. 2-12). We respectfully direct the attention of the Court to enormity and extent of the trespass charged as against the deadly parallel presented by the meager and unsatisfactory character of the evidence presented by plaintiff at the trial. Summarizing the evidence as to livestock of the defendants being willfully and knowingly caused to be driven or willfully and knowingly permitted to drift and be driven upon more than 15 sections of land and the actual damages sustained and the necessity of the intervention of a court of

equity to remedy the alleged wrongs, the evidence wholly fails to sustain the allegations of the complaint, as will clearly appear from a consideration of plaintiff's evidence.

Plaintiff's witness Stephenson testifying as to only one observation of either of defendants' livestock possibly being on allotted land, prior to filing the complaint, testified that on October 21, 1941, in company with a Mr. Girard and a Mr. Barrett he saw 36 head of horses in section 11, township 35 North, range 9 West, and saw no cattle on that day (R. 122, 123). Apparently he failed to examine the brands as he did not state same. Plaintiff's witness Barrett testifying as to this occasion said it was on October 24, 1941, and that they saw 36 head of cattle branded PY (Brian Connolly's brand) and part branded AX (Daniel Connolly brand) but did not state the number bearing each brand (R. 161). Mr. Girard, the other witness of plaintiff, as to this occasion testified the date was October 21, 1941, and that he saw 36 head of cattle branded PY and AX, but apparently did not know upon what or whose land or allotment same were at the time as he failed to identify the location (R. 150, 151).

The following is the only other evidence as to times livestock of either defendant possibly **being on allotted Indian land**. Plaintiff's witness Barrett stated he and a Mr. Girard on July 24, 1941, observed 25 head of horses branded PY (Brian Con-

nolly's brand) on allotted land in the one section, 21-35 North, range 9 West only (R. 162). Witness Girard testified on this date he saw 25 head of horses in the two sections 20 and 21, township 35 North, range 9, but apparently did not observe whether they bore the brand of either defendant and he did not testify whether they were located on allotted land or not (R. 150). Girard also testified to 25 head of cattle on August 6, 1941, in sections 11 and 14, 35 North, range 9 West (R. 150).

In brief the only evidence of cattle or horses of either defendants being on allotted Indian land was a total of 36 head of mixed PY and AX livestock, uncertain whether horses or cattle and as to number of each, on October 21, 1941, on one section only, 25 head of horses bearing PY (Brian Connolly brand) being on one or at most scattered over two sections and 25 head of cattle of "Connolly Cattle" scattered (apparently) in two sections, and without identification as to brand on cattle or whether Brian Connolly's or Daniel Connolly's.

As to plaintiff's evidence of defendants' livestock observed on other land prior to filing the complaint, the record discloses the following:

Plaintiff's witness Girard stated on August 6, 1941, he and a Mr. Wershing (at time of trial in Army service) saw 28 head of horses branded PY (Brian Connolly brand) in sections 3 and 10, township 34 North, range 9 West, and 20 head of horses scattered

(apparently) over six sections of land in township 35 North, range 10 West, and 25 head of cattle in sections 11 and 14, township 35 North, range 9 (R. 149, 150). The witness did not identify the ownership of the cattle or brands thereon, and what brands they bore or the respective numbers owned by Brian Connolly or by Daniel Connolly is left to conjecture.

Plaintiff's witness Barrett testified he and Mr. Girard on August 8, 1941, counted 2 head of cattle on section 22 - 34 - 9, 23 head of cattle on sections 16 and 21 - 35 - 9, and 25 head of horses on section 11 - 35 - 9. The witness did not identify any of these as either being owned by or bearing the brands of either of the defendants (R. 158). Mr. Girard evidently had no recollection of this occasion as he failed to corroborate the testimony of Mr. Barrett notwithstanding he was called as a witness for plaintiff (R. 148-156).

Witness Barrett also stated that he and Darrell Young on August 13, 1941, saw 32 head of horses branded PY (Brian Connolly brand) on the South half of section 11 - 35 - 9 (R. 160). Plaintiff's witness Darrell Young, referring to the incident, stated the 32 head were on sections 1 and 13 - 35 North, range 9 West.

On none of the occasions testified to by plaintiff's witnesses were either Brian Connolly or Daniel Connolly or any agent of either defendant seen driving or herding any of the cattle or horses, or seen in the

vicinity of same, nor was there any evidence as to length of time the horses or cattle remained on the land where seen. Furthermore plaintiff's complaint admits that Brian Connolly had the right to graze approximately 8,000 acres of land in proximity of the places where the witnesses saw the cattle and horses, and there is no suggestion that this land was overstocked by the defendants. In fact, the evidence showed that the Connollys had a large excess of range land over their requirements on the basis of 24 acres for each head of cattle and 36 acres for each horse.

As against the complaints charge of a knowingly, willful continuous herding and drifting of approximately 260 head of cattle and 75 head of horses from August 6, 1941, to November 22, 1941, over an area of more than 15 sections of land the plaintiff's evidence possibly shows, if discrepancies in the testimony are ignored, the following isolated times and numbers of livestock of the Connolly's being seen off of their lands, to wit:

July 24, 1941, 25 Brian Connolly horses scattered on 2 sections,

August 6, 1941, 48 Brian Connolly horses scattered on 8 sections,

August 8, 1941, 25 cattle, 25 horses (not identified as Connollys',

August 13, 1941, 32 Brian Connolly horses on 1 or 2 sections,

October 21 or 24, 1941, 36 head horses, mixed defendants' brands, according to Mr. Stephenson, but 36 head cattle according to Messrs. Barrett and Girard.

The horses seen on August 8, 1941, not being identified as to ownership, must be eliminated, leaving July 24, August 6, and August 13, with a total of 105 horses of Brian Connolly's PY brand, and on October 21st or 24th 36 head of horses or cattle (which uncertain) bearing PY and AX brands, but number of each not given.

The following is a resume of the plaintiff's evidence as to times livestock observed after the filing of the complaint offered to indicate a possible willful intent to continue alleged trespassing by defendants' livestock.

Plaintiff's witness Stephenson stated he, in company with Mr. Girard, on Jan. 16, 1942, saw 78 head of cattle in section 2, township 34 North, range 9 West, land adjoining Brian Connolly's grazing permit in Unit 12, but did not identify them as belonging to either of the defendants, either by brand or ownership (R. 124). Mr. Girard, plaintiff's witness, apparently had no recollection of this incident as he failed to support Mr. Stephenson's testimony (R. 148-156, 358).

Stephenson further stated that on Jan. 28, 1942, with Mr. Girard, he saw 22 head of cattle belonging to "Mr. Connolly (we assume he meant the father of

Daniel Connolly) on sections 3 and 4, township 34 North, range 9 West (this land immediately adjoins Brian Connolly's permit land in Unit 12) (R. 123). Again Mr. Girard (plaintiff's witness) apparently had no recollection of this incident as he made no mention of same.

Witness Stephenson also stated he, and witness Girard, on Monday of the week of the trial (this would be May 3, 1943, as trial was May 6, 1943, R. 85), he saw 7 head of "Mr. Connolly's horses in section 16, township 34 North, range 9 West, and 3 of his cows and 9 head of his horses in section 18, township 35 North, range 10 West (R. 124). Again we find Mr. Girard's memory apparently lacking as to an incident occurring only three days prior to the trial as he failed to mention same.

The witness Stephenson testified further that on January 27, 1942, he, in company with plaintiff's witness Barrett, saw 8 head of horses "on Connolly's" (we assume he meant of Connolly's) in section 10, township 34 North, range 9 West, and 18 head of cattle (not identifying ownership) in section 4, township 34 North, range 9 West (R. 123, 124). Again we are confronted with an apparent loss of memory of a witness for plaintiff, as Mr. Barrett failed to make any mention of this incident (R. 157-164).

With the exception of the incident of May 3, 1943, it is to be noted that the livestock seen since the fil-

ing of the complaint were observed on sections adjoining Brian Connolly's land on the South in January in the heart of the Winter when cattle will naturally drift southward.

Neither of the defendants were observed driving or herding the horses or cattle and apparently from October 22, 1941, to January 28, 1942, and from the latter date until May 3, 1943 no Connolly cattle were observed off of land which they owned or had grazing permits upon.

Further, the record fails to show a single incident when either of the defendants failed to remove their livestock from any land when their attention was directed to same. A further circumstance showing want of any intentional trespass is that during all of the time alleged in the complaint when alleged large droves of cattle were being driven, herded and drifted by the defendants, no complaint was ever made by neighbors or persons having grazing rights adjoining the Connolly land (R. 142).

No actual damage was shown by plaintiff to either grass or roots or herbage although an alleged actual damage of \$1341.00 was alleged (R.9).

Ignoring the conflicts in the testimony of the plaintiff's witnesses and the lack of supporting testimony by other witnesses present at the time of occurrence of the facts testified to and placing the plaintiff's case in its strongest aspect, we find four separate occasions in which livestock of one or both of defendants were observed on certain land either not

owned by defendants or upon which they had no written grazing permits prior to the filing of the complaint and four separate occasions (three in the midst of Winter) during a perior of about eighteen months after complaint filed and before the trial.

The evidence presents a case of where livestock following its characteristic to stray leaves its range without knowledge of the owner and without intent in him to trespass.

There is not a scintilla of evidence showing the Connollys at any time drove or otherwise conveyed livestock to feed or range on Indian land, either allotted or tribal, nor is there any evidence to show an over-stocking of the Connolly range.

The plaintiff's own evidence establishes that there was no continuous trespass as the plaintiff's witnesses did not remain to determine how long the stock was off the Connolly land or when or what steps were taken by the Connollys to return the stock.

The department recognized the natural characteristic of livestock to stray and as Mr. Stephenson stated such straying is not deemed a trespass where lands are unfenced and the owner is diligent in returning the animals (R. 139). Diligence presupposes knowledge and at no time is it shown that defendants failed to return their livestock from other land to their own land when they discovered same had strayed.

The defendants were never notified by any of the witnesses to the fact that the stock they claimed to have seen were off defendants' range. Information

came on one or two occasions only by letter and the Connollys took immediate steps to return their livestock (R. 248-251). In fact, the evidence is uncontradicted that the defendants and the Connolly children were instructed to keep their livestock on their own range and water and rode daily to turn back straying livestock (R. 245, 246, 290, 295, 297).

Offsetting the plaintiff's case we have the following uncontradicted evidence on behalf of defendants. Brian Connolly, father of co-defendant Daniel Connolly, had, according to witness Stephenson, a total grazing right to between 9,000 and 10,000 acres of land (R. 129, 130). The written exhibits show he had 8395 acres of land on which to graze livestock (R. 89-121, 187-190, 191-208, 210-219, 220-243), and in addition thereto 280 acres from Clara Hanson (R. 183), and there is considerable evidence as to grass paid for direct to the allottee, Joe Kipp, by Brian Connolly (R. 279, 281) about 1120 acres.

The complaint alleges and answer admits 24 acres for cow and 36 acres for a horse required (R. 11).

Computing, we find that Connollys needed for their operations as follows: 3120 acres for his cattle at 130 head, or 2860 acres if computed at 140 head; 2150 acres for 75 horses, computed at 30 acres per horse, or 3000 acres for 100 head, 2700 acres if computed at 36 acres for 75 horses, or 3600 acres if computed at 100 head at 36 acres per head (R. 181, 182). Stephenson testified that calves under six months were not counted, and colts take the same status,

which would lessen the required acreage in proportion to the colts and calves, but taking the highest figures and we have 3360 acres for cattle and 3600 acres for horses or a total of 6960 acres for all of the Connolly livestock. From this it conclusively appears that Connollys were not over-stocking the range at any time and were paying for all of the grass that their stock could possibly use.

This discussion brings us to a consideration of the cattle that Connolly ran for other people in 1941. It was testified that he had 42 to 45 head of Payne cattle either in 1941 or 1942, the government witness could not remember which year (R. 152), but even so, this would not require more than 1080 acres, which would still leave Connolly with an excess of one thousand seven hundred fifty five acres of land above his total requirements.

The area involved in the evidence and upon which stock of the defendants were observed to graze was and is open unfenced lands (R. 248, 291-293).

In view of the foregoing the irresistible conclusion reasonably must follow that the weight of the evidence decisively preponderates against any actionable trespass warranting either damages, nominal or otherwise, and against the grant of the extraordinary remedy by way of injunction.

Before concluding this part of the brief we shall briefly allude to the money judgment against both of the defendants for the penalty of \$258.00. The evidence of plaintiff shows definitely an actual total

of only 105 head of cattle owned by Brian Connolly seen off of his land and 36 head of mixed livestock bearing the respective brands of both defendants without a specification of number of each. Clearly, Daniel Connolly may not be penalized for the stock owned by his father or Brian Connolly for that of his son. The trial court nevertheless imposed a penalty of \$258.00 when the total number of all cattle identified could not be penalized in excess of \$1.00 a head under the statute, or a total of \$105.00.

Thus the court erred in making findings of fact Nos. IV, V, VI, VII (R. 47, 48, **specifications of error 1, 2, 3 and 4 supra**), and rendering judgment against the defendants (R. 51-55, **specifications of error 7 supra**).

The impropriety of imposing the statutory penalty, as a matter of law under section 179, Title 25 U.S.C. or the penalty under section 71.2 of Title 25, Code of Federal Regulations, will be considered in the following subdivision of this brief.

2. Penalty imposed under section 179, Title 25, United States Code.

Section 179 of Title 25 U.S.C. provides substantially that if any person **shall drive, or otherwise convey any stock of horses, mules, or cattle to range and feed on any land belonging to any Indian or Indian Tribe, without the consent of such tribe, such person shall forfeit the sum of one dollar for each animal of such stock** (emphasis ours).

There is not one iota of evidence showing the de-

fendants, or either of them, at any time drove or conveyed livestock to range or feed on any land belonging to any Indian or Indian tribe. The statute clearly applies to a willful and intentional trespass, and since it involves a forfeiture by way of money penalty same should be strictly construed.

The allegations of the complaint and prayer for relief by way of injunction and actual damages presents a case wherein equitable relief is sought, not punishment of defendants. In fact paragraph X of the complaint alleges that plaintiff is seeking a remedy "in a court of equity where matters such as those hereinabove set forth are cognizable." No suggestion of recovery of a penalty under the above penal statute is intimated.

Undoubtedly the plaintiff in framing the complaint had under consideration the decision of this Circuit Court of Appeals in the case of *Ash Sheep Company v. The United States* 229 Federal Reporter 479, affirmed 250 Federal Reporter 591, wherein this court held in granting equitable relief, which was the principal relief sought in the cause at bar (temporary and permanent injunction), the court would not aid in the collection of a penalty provided by the foregoing section 179 of 25 U.S.C.

Independent of the provisions of Section 81 of the Federal Rules of Civil Procedure, and even under the provisions of Rule 2 of the Rules of Civil Procedure, providing for one form of action, the authorities agree that in administering equitable relief the court

will observe the rules theretofore observed by courts of equity in granting such relief.

Schwindt v. Lane Potter Lumber Company,
40 Mont. 537, 107 Pac. 818,

See also discussion of Rule 2 and quotation from the authorities appearing in Vol. I Federal Rules of Civil Procedure, pp. 62-65, and 75-79,

1 Bancrofts Code Practice & Remedies,
Section 171, p. 257.

In *Samuell vs. Moore Mercantile Co.*, 62 Mont. 232, 204 Pac. 376, the court, in construing a code provision of Montana identical with Rule 2 of the Federal Rules of Civil Procedure, said: "though the form and the name of the action is abolished, the distinctions between the character of different actions necessarily arise from the nature of the wrong which is suffered and the relief which is sought, so that a reference to the forms and principles of common law pleading is frequently of aid in determining the rights and remedies of litigants." Notwithstanding the foregoing rules, and the fact that there was no evidence to show any number of livestock owned by defendant Daniel Connolly upon which to base a penalty and in face of the evidence showing a total of 105 head of Brian Connolly stock on certain land, the court found (R. 47) that the defendants were both liable for a penalty of \$258.00 and rendered judgment for such sum (R. 54).

It is true the District Court found as a fact that

both defendants had "willfully refused to remove their trespassing cattle and horses from the lands and premises of their Indian neighbors" and continued to allow their livestock to trespass and destroy the grasses, feed, etc., growing thereon and refused to remove same when requested by officers of the Indian Service (R. 48), but this finding is clearly without sufficient evidence to support same. There is no testimony of a request for removal, either written or verbal, of any trespassing cattle and a refusal by either of the defendants to remove same. Witness Stephenson stated substantially that he had a conversation with "Mr. Connolly" (apparently Brian Connolly) about restricting his cattle in the future as he was there to enforce the rules and regulations of the Indian Department (R. 146), and Mr. Connolly told him "that those were Indian stock, that they could run anywhere on the Reservation that he wanted them to" (R. 147). Brian Connolly, referring to Mr. Stephenson's testimony, said he did not make the statement as testified to by Mr. Stephenson. His statement was that "we had a right to run for our own family where there is no fence" (R. 260). He further explained to Mr. Stephenson what he meant by his statement was stock that accidentally strayed off the unit onto adjoining land where unfenced. This appears when the testimony of witness Connolly is examined (R. 260).

"Q. This morning Mr. Stephenson testified that he had a conversation with you at one time

wherein you substantially notified him, or informed him that you could drive your livestock any place you wanted to on the Reservation. Do you recall him so testifying this morning?

A. I do.

Q. Did you make that statement to Mr. Stephenson at any time?

A. I didn't make any part of that.

Q. What was the statement you made to him at that time?

A. That we had a right to run for our own family where there is no fence.

Q. Did you make any complaint as to stock that was accidentally strayed off the Unit on the adjoining lands, or what did you say at that time?

A. I tried to explain to him about it, it couldn't be helped to keep them off; it was impossible to keep them off.

Q. That was the substance of your statement?

A. Yes." (Emphasis ours.)

The Court will observe how witness Connolly explained how it was impossible to keep cattle from straying onto unfenced land. Mr. Stephenson did not in rebuttal deny that witness Connolly made such explanatory statement (R. 357). No evidence appears of a single instance of a notification of any trespassing stock to Connollys and their refusal or failure to return same to their land.

Opposed to the statement of Stephenson is the evidence of the instructions given by Brian Connolly to

Daniel and his other sons to ride every morning for stray stock and turn them back on their own range and the following of such instructions by the father and the sons (R. 260, 248, 250, 288- 291, 295, 296), and the testimony of Brian Connolly that when he received the three letters about some of his stock being off his range he went out and removed same (R. 248-251).

The trial court's finding of fact No. VII (R. 48, specification 5 *supra*), is to the effect that the lands and premises upon which Brian Connolly had grazing rights were in no wise involved in this action. This is clearly erroneous. The Connolly family, including Daniel Connolly, had certain land they owned in Unit 12 and other land, and they had grazing rights in that unit and on other land (R. 102, 89-121, 7). Adjoining were large areas of unfenced land. The natural characteristic of livestock to stray was known to plaintiff and its officers and even under plaintiff's interpretation of the law and regulations it was the policy of plaintiff not to deem straying stock as a trespass if the owner is diligent in his efforts to return them (R. 139). The entire evidence in this case shows that the livestock involved were stray stock only and that defendants were diligent in their efforts to return them to their own lands. If Connollys had no land and merely willfully drove and herded livestock onto the lands of their neighbors a different question would be involved.

The trial court found that the defendants and each

of them were Indian persons, wards of the government of the United States and under the charge of the Superintendent of the Blackfeet Indian Reservation in the state of Montana (R. 46). The penal statute, section 179 Title 25 U.S.C.A., was originally passed by act of Congress in 1796 and was then entitled as follows: "AN ACT TO REGULATE TRADE AND INTERCOURSE WITH THE INDIAN TRIBES, AND TO PRESERVE PEACE ON THE FRONTIERS." 1 Stat. 469, 470 (1796).

The foregoing section was re-enacted without change in 1802. 2 Stat. 139, 141.

Ash Sheep Co. v. U.S. 40 S. Ct. 241, 252 U.S. 259.

In 1834 (Act of June 30, 1834, c. 161, Sec. 9, 4 Stat. 729, 730) it was given its present form, which also was carried into the revised statutes without change in the wording, Rev. Stats. 2117.

It will be noted this statute was almost 150 years old at the time this action was commenced against these Appellants. It will be observed also that the title of the statute makes no reference whatever to trespasses by Indians on their own reservation; it appears to be the intent and purpose of the statute as originally enacted to protect Indian tribes in their trade and intercourse with outsiders and to protect the peace of the frontiers.

It will be further noted that even though this section of the statute applied to individual Indians at the time it was enacted, the United States had no jurisdiction at the time over the Blackfeet Tribe of Indians.

The Treaty of 1855 is the first record we have of any matter involving the Blackfeet Tribe. Examining the Treaty of 1855 with the Blackfeet Indian Tribe and other tribes Art. 3 thereof provides in part as follows:

“Where all nations, tribes and bands of Indians, party to the treaty, may enjoy equal and uninterrupted privileges of hunting, fishing, gathering fruit, grazing animals, curing meat and dressing robes.”

The foregoing provision when read with article 4 of the treaty makes the lands on the Blackfeet Indian Reservation common ground to all these Indians as affects their right to graze animals within the confines of this reservation. The right to graze animals is exclusive and section 2117 R. S., Sec. 179, 25 U.S. C.A., only attempts to protect the Indian Tribes in their tribal treaty rights and to keep persons not members of the tribe off of the lands belonging to the Indians.

Article 7 of the Treaty of 1855 with the Blackfeet Indians provides:

“and the United States is hereby bound to protect said Indians against depredations and other unlawful acts which white men residing in or passing through their country may commit.”

The Treaty with the Blackfeet of 1855 will be found in Kapplers Indian Affairs, Laws and Treaties, Vol. II, 2d Ed., pages 736 to 740.

Had it been the intent of the plaintiff to exercise jurisdiction over trespassing by animals belonging to the individual members of the Blackfeet nation, then the language of the treaty would have been so worded so as to have made that point clear; that this is the case will be found from an examination of the subsequent relations with the Blackfeet nation and other tribes included in the Treaty or agreement of 1885.

Article VI of the Treaty of 1869 with the Blackfeet nation and other tribes provides that heads of families, and other persons belonging to the tribe not heads of families, may select 320 acres if heads of families and 80 acres to all other for their exclusive use for farming. “**Exclusive**” is the word used. That intentionally leaves other lands to the Blackfeet nation **in common**.

These rights were not changed or modified by the agreement of 1887 with the Blackfeet nation. See Kappler Vol. II, pages 261-66.

The Treaty or agreement of 1895 expressly retained all rights to the Indians not therein or theretofore relinquished by treaty. Article V of the Treaty or agreement of 1895 expressly provided:

“but during the existence of this agreement no allotments of lands in severalty shall be made to them but that the whole reservation shall continue to be held by these Indians as a **communal grazing tract upon which their herds may feed undisturbed.**” (Emphasis ours.)

The foregoing clause bears out the contention of the

Appellants and shows that the Indian has never been deemed or considered a trespasser upon his own reservation and it further shows that it was the intent and purpose of the United States and the Indian Tribe to have these grazing lands used in common.

The contention is further supported by the Wheeler-Howard Act, Act of June 30, 1934, under the terms of which Indian Tribes were given a considerable measure of self government after they elected to come under that act and adopted a charter and by-laws approved by the Secretary of the Interior, all of which was done by the Blackfeet Tribe, during the years of 1935-36. This is shown in the Transcript.

The record shows that the lands involved in this action were allotted to the members of the Blackfeet Tribe on or about the year 1918 when trust patents were finally issued. The said patents were issued under Article VI of An Act to Ratify and Confirm a Treaty Agreement with the Blackfeet and Other Tribes of Indians, approved May 1, 1888 (28 Stat. 113), and the Act of February 8, 1887, known as the General Allotment Act (24 Stat. 388), and the Indians acquired vested rights by virtue of said treaty and allotment act which vested rights the courts have uniformly held run with the land and the Federal Government has no right or authority to change or modify those rights. In a great number of cases already decided in the Federal courts among them *Heckman v. United States*, 224 U. S. 413, 32 S. Ct. Rep. 424 and *Choate v. Trapp*, 224 U. S. 665, 32 S. Ct.

Rep. 565, U. S. v. Glacier Co., 17 F. Supp. 411, 99 F. 2d. 733, Indian personal and property rights are protected.

Felix S. Cohen, a solicitor of the Interior Department, in a treatise on Indian rights in Federal courts published in 1940, declares that the Indian tribes or nations have sole jurisdiction of criminal offenses and says at page 152 in a reprint 24 Minnesota Law Review, 145-200:

“So much consternation was created by the Supreme Court’s decision in **Ex parte Crow Dog** that within two years Congress had enacted a law making it a federal crime for one Indian to murder another Indian on an Indian reservation. This law also prohibited manslaughter, rape, assault with intent to kill, arson, burglary, and larceny. In later years notorious cases of robbery, incest, and assault with a dangerous weapon resulted in the piecemeal addition of these three offenses to the federal code of Indian crimes. There are thus, at the present time, ten major offenses for which federal jurisdiction has displaced tribal jurisdiction. Federal courts also have jurisdiction over the ordinary federal crimes applicable throughout the United States (such as counterfeiting, smuggling, and offenses relative to the mails), over violations of special laws for the protection of Indians, and over offenses committed by an Indian against a non-Indian or by a non-Indian against an Indian which fall within the special code of offenses for territory “within the exclusive jurisdiction of the United States. All offenses other than these remain subject to tribal law and custom and to tribal courts.”

Crow Dog Case 1883, 109 U. S. 556, 3 S. Ct. 396, 27 L ed 1020.

Later in the same Treatise Solicitor Cohen states that since the adoption of the Wheeler-Howard Act of June 18, 1934, the Tribes that have elected to come under the said Act have adopted the "law and order problem" of their jurisdiction. He says at page 155:

"The scope of the law and order problem which these tribes face is measured by the lacunae of federal law. There is no federal law to deal with simple assault committed by one Indian against another on an Indian Reservation, or with adultery, seduction, bigamy, kidnapping, receiving stolen goods, obtaining money under false pretenses, embezzlement, blackmail, libel, forgery, fraud, **trespass**, mayhem, bribery, killing of another's livestock, setting fire to grass or timber, use of false weights and measures, pollution of water supplies or disorderly conduct. The list is by no means complete."

Not until 1885 did Congress take steps to assume any jurisdiction over crimes committed on an Indian Reservation. Act of March 3rd, 1885, 23 Stat. at Large 385, Title 18 U.S.C. and U.S.C.A. Sec. 548. The latter Act covered only murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, arson, burglary, robbery and larceny on and within any reservation under the jurisdiction of the U. S. Trespasses by one Indian vs. another on his reservation has never been penalized by any U. S. Law.

The case of *Worcester v. Georgia*, 6 Pet. 543 and

ex parte Crow Dog, 109 U. S. 556, 3 S. Ct. 396, 27 L. Ed. are without doubt the controlling cases in the matter of Indian rights of self government and as Mr. Felix Cohen has ably set out in his Treatise, referred to above, all jurisdiction remains in the Indian Tribe except where expressly assumed by act of Congress. It is apparent that there was no right on the part of the United States to prosecute an action for trespass as between Indians of the same Tribe on their own Reservation, or as affects a member of the tribe while grazing animals on his own Reservation. This was true up to the time Mr. Cohen compiled his authorities in 1940; so it seems to be clear that the Court was without jurisdiction to penalize the Connollys or to entertain jurisdiction of the action. It is Mr. Cohen's opinion that since the enactment of the Wheeler-Howard Act the United States has no further jurisdiction in criminal matters not then in force, and that the election of the Indian Tribe to come under the Wheeler-Howard Act and the adoption of their law and Order Code ousts the United States from jurisdiction from those offenses generally described in the Law and Order Code.

Mr. Felix Cohen's conclusion on Indian rights are as follows:

“The defense of Indian rights in the federal courts is a significant part of the pageant of American liberty. Across the panorama of the years pass judges who were tolerant enough to appreciate the grievances of an oppressed people and courageous enough to vindicate rights that Presidents, cabinet officers, army general and

reservation superintendents had violated. Chief Justice Marshall defending the rights of the Cherokee Nation which the hardened Indian fighter in the White House refused to enforce, Judge Dundy, issuing his writ of habeas corpus against General Cook, and the long procession of their fellow justices who have made Indian law—not the least of them Justices Grier, Sanborn, Lamar and Van Devanter—have played their part in the defense of American liberty. And across the decades, there march old Indian chiefs and warriors, forgotten criminals and peaceful victims of the white man's exploitation, each playing his part in the struggle to vindicate the human rights of a vanquished race. The murderer, Crow Dog, and the leader of exiles, Standing Bear,—John Ross, the Principal Chief of the Cherokee Nation in its trek to Indian Territory across the Trail of Tears, the Quinaielt Indians who insisted upon their right to fish on their own Reservation, the Choctaws and Chickasaws who insisted that the United States fulfill its promise that their allotted lands be exempt from taxation—all are part of this pageant of American liberty. For our democracy entrusts the task of maintaining its most precious liberties to those who are despised and oppressed by their fellow men."

3. The striking of the allegations of the amended answer of Brian Connolly on motion of plaintiff was erroneous.

Federal Rules of Procedure, rule 12, section (f) provides substantially, in so far as presently pertinent, that upon motion by a party the court may order redundant, immaterial, impertinent or scandalous matter stricken from any pleading. The rule makes it a discretionary matter with the court. In constru-

ing the rule Federal Courts have enunciated certain considerations guiding the exercise of such discretion.

Motions to strike are not regarded with favor and should be denied unless the allegations have no possible relation to the controversy or may prejudice the other party.

Hansen Packing Co. v. Armour & Co.
16 F. Supp. 784, at 787 (D. C. N. Y.),

Radtke Patents Corp. v. Taghbue Mfg. Co.
31 F. Supp. 226 (D. C. N. Y.).

Where it is doubtful whether under any contingency the matter may raise issues the motion should be denied.

Samuel Goldwyn Inc. v. U. S. Corp.,
35 F. Supp. 633, (D. C. N. Y.).

In *Brinkey v. Lewis*, 27 F. Supp. 313, at 314, the District Court (Pennsylvania) in denying a motion to strike certain matter from a complaint allegations characterizing the manner of an assault said, "The matter alleged cannot injure the defendant but will give him a more definite idea of the nature of the case to be presented."

By the treaty of Laramie the right of various Indian Tribes to occupy and exercise jurisdiction over certain land rights west of the Mississippi river was recognized. For the purpose of the present case, we need look no further than the treaty of October 17, 1855 (Vol. II "Indian Laws and Treaties," Kapler,

2d edition, p. 736), (11 Statutes at Large, 657, 662), and the executive order made in the year 1875 establishing the present boundaries of the Blackfeet Indian Reservation. (18 Stat. 28). Article 4 of the above treaty gives the right of exclusive control to the Blackfeet Indian Tribe to the area referred to and Article 4 defined the territory of the Blackfeet Nation and conferred "exclusive jurisdiction" upon the Blackfeet Tribe, to the territory defined. The territory of the Blackfeet Nation as described in the treaty embraced a much larger area than the present area although the treaty area included the present area of the Blackfeet Reservation.

Vol. II "Laws and Treaties," (Kapler),
pp. 736-739 (2d edition).

The pertinent provision of the treaty reads:

"The parties to this treaty agree and consent, that the tract of country lying within lines drawn from the Hell Gate or Medicine Rock Passes, in an easterly direction, to the nearest source of the Muscle Shell River, thence down said river to its mouth, thence down the channel of the Missouri River to the mouth of Milk River, thence due north to the forty-ninth parallel, thence due west on said parallel to the main range of the Rocky Mountains, and thence southerly along said range to the place of beginning, shall be the territory of the Blackfeet Nation, over which said nation shall exercise exclusive control, excepting as may be otherwise provided in this treaty."

That "grazing animals" was within the "exclusive

jurisdiction” of the tribe, under Article 4, is evidenced by the preceding Article 3 of the treaty which set aside a tract of land in which several enumerated tribes, inclusive of the Blackfeet Nation, were given common rights of “hunting, fishing, and gathering fruit, grazing animals, curing meats and dressing robes.”

The executive order fixing the present boundaries of the Blackfeet Indian Reservation, did not in any manner restrict the grazing rights of the Blackfeet Indians upon and in the lands embraced within the executive order.

The constitution of the United States (Article VI) provides that the constitution and laws of the United States made in pursuance thereof and all treatise made, or which shall be made, under the authority of the United States shall be the Supreme Law of the land. Therefore by special mandate treaties made with the Blackfeet Indians constitute part of the supreme law of the land.

United States Revised Statutes, section 2079, 25 U. S. C. A. section 71, expressly recognizes the validity of the Indian treaties made prior to March 3, 1871.

The executive order above mentioned did not in any manner affect the title of the Indians to the lands referred to therein which were part of the lands in the treaty of 1855. The rule of law is well established that the Indian Title to right of occupancy is identical under treaty reservation and executive order reservation.

Spalding v. Chandler,
160 U. S. 394. 40 L. ed. 469,

McFadden v. Mountain etc. Co.
97 Fed. 670 (9th Circ.), at 673, (bottom of
page),

Gibson v. Anderson,
131 Fed. 39, citing 97 Fed. 670.

Indian Treaties are interpreted most favorably to
the Indian Tribe.

Choate v. Trapp,
224 U.S. 665, 667, 56 L. ed. 941, 946,

Gritts v. Fisher,
224 U.S. 640, 648, 56 L. ed. 928.

The right of self government except where re-
stricted by treaty or act of Congress is in the Indian
Tribe and because the treaty used the words “hunt-
ing grounds” such did not restrict the full use of the
lands reserved by the Indians.

Worcester v. State of Georgia,
6 Peters 515, 8 L. ed. 483.

The right of Indians to the reservation land is not
dependent on the treaty as a grant but rests upon
their original title which is confirmed by the treaty
and the rights of Indians to the uses therefore made
of the land still subsists (Citing U. S. v. Winans, 198
U. S. 371, 49 L. ed. 1089). This was an action to quiet
title of Indians of the Quinaielt Reservation in Wash-
ington to certain tide lands.

U. S. v. Romaine,
255 Fed. 253 (C. C. A. 9th).

The right of self government except as restricted by treaty or Act of Congress is in the Indian Tribe.

Worcester v. State of Georgia,
8 L. ed. 483, 6 Peters 515.

In the above case the court further held (Justice Marshall) that the use of the words "hunting grounds" would not restrict the full use of the land reserved by the Indians.

Treaty provisions by the United States with the Indian Tribes are not to be interpreted narrowly but to be construed as Indians would understand them.

U. S. v. Shoshone Tribe,
82 L. ed. 1213, 304 U. S. 111,

U. S. ex. rel. Marks v. Brooks,
32 Fed. Supp. 422.

Doubtful provisions in treaty are to be interpreted in favor of the Indians.

U. S. v. Nez Perce County,
95 Fed. (2) 232.

Treaty may be superseded by subsequent act of Congress.

U. S. ex. rel. Mark v. Brooks Supra.

The power to abrogate a treaty is in the United States but it must be done by Act of Congress and **the intent to revoke the provisions of the treaty must be clear.**

Osage Tribe v. U. S.
66 Ct. Cls. 64, Certiorari
denied 279 U. S. 811, 73, L. ed. 971.

The act of March 3, 1871 abolishing the making of treaties with Indian Tribes expressly recognized the validity of prior treaties. Where the right to hunt and fish in lands, sold by an Indian Tribe are reserved, such are property rights, rather than rights of sovereignty.

Kennedy v. Becker,
241 U. S. 556, 60 L. ed. 1166.

In *Mason v. Sams*, 5 Fed. (2) 255, (District Judge Cushman writing the opinion) held that, under the rule that treaties with the Indians are to be construed in favor of the Indians, the provisions of the treaty of 1885 with the Tahelah Indians that a tract of land to be selected should be "reserved for the use and occupation of the Tribe and bands aforesaid **** and set apart for their exclusive use and no white man shall be permitted reside thereon without permission of the Tribe or of Superintendent of Indian Affairs or Indian Agent" gives to the individual Indian an exclusive right of fishing on the reservation.

The above decision further held that under such treaties made neither the Secretary of Interior nor Commissioner of Indian Affairs have any authority to make regulations under which particular locations on the Quinalt Reservation are assigned to individuals with exclusive rights thereon or require that they pay royalty on fish caught and sold and all fish sold were required to be sold to licensed buyers under regulations made and it was also provided that violation of such regulations would entail the withdrawal

of fishing privileges for a specified period and also provided that fines might be assessed. The treaty also reserved the right of pasturage on the open unclaimed land and the right to take berries and roots and also hunt. The treaty did not expressly provide for the **exclusive right** to fish on the reservation.

The Court further held that the treaty gave the rights to the Indians of the tribe in common. That the Secretary of Interior **could not charge them royalty for the exercise of such right even though the proceeds were to go to the benefit and credit of the tribe and that neither the Secretary of Interior or the Commissioner of Indian Affairs was vested with any discretion with respect thereto.**

See also:

U. S. v. Winans,
198 U. S. 371, 49 L. ed. 1089.

The Act of June 2, 1924, 45 Stat. 253 c. 233, in granting citizenship to the Indians expressly preserved the rights of the Indians to tribal or other property.

In the case of U. S. v. Winans, *supra*, the Court, in sustaining the common right of fishing in the individual Indians held that subsequent admission of the State of Washington to the Union and the issuance of patents bordering the stream by the United States did not defeat the rights of the Indians. The Court held that a treaty with an Indian Tribe is not a grant of rights but a limitation of rights and all rights not expressly limited are reserved to the Indian Tribe, as interpretation of the treaty is to be in favor of the In-

dians and in the sense the unlettered Indian understand the language.

In *U. S. v. Stotts*, 49 Fed. (2) 619, (1930), it was held that the rights to the land reserved by the treaty were common rights and allotment of a part of the reserved lands did not destroy such common rights in the enjoyment of the unallotted lands; that the right of occupancy is not predicted upon a grant by the United States but under the reserved aboriginal right which the Indians inherently held in the land segregated and withheld from the land ceded by the Indians under the treaty.

Treaties must be construed not according to the technical meaning of its words to learned lawyers but in the sense in which they would naturally be understood by the Indians, and doubtful clauses in the treaty are resolved in a non-technical way as the Indian would have understood the language.

Jones v. Meehan,
175 U. S. 1, 44 L. ed. 49, 54.

Brian Connolly and Daniel Connolly by virtue of their treaty rights could not be held trespassers where the allotted or tribal lands were unfenced. Therefore allegations of their treaty rights and that the plaintiff and the Blackfeet Tribe had so interpreted the treaty since its adoption was pertinent and material as showing the understanding of both the plaintiff and the Blackfeet Tribe of what was intended by the treaty (R. 29, 30), and the trial court erred in striking such allegations (R. 33, 34). We have found no

statute which has taken away the above rights as to unfenced lands.

The Wheeler-Howard Act of June 18, 1934, 48 Stat. 984, 25 U. S. C. 467, authorizing tribes to organize and incorporate does not abrogate tribal rights. In fact, it enlarges certain of such rights. Among other things, the act provides "In addition to all powers now vested in any Indian tribe by existing law the constitution adopted by such tribe shall also vest in such tribe or tribal council the following rights and powers *** to prevent the sale, disposition, lease, or encumbrance of tribal lands", and under section 17 of the same act it is provided that a charter of incorporation to be issued to any tribe may convey to the incorporated tribe the power to own, hold, manage, operate and dispose of real and personal property including the power to purchase restricted Indian lands and issue in exchange interests in corporate property but no authority shall be granted to sell, mortgage, or lease for a period exceeding ten years any of the land included in the limits of the reservation.

By Section 6 of the same act the Secretary of the Interior is directed to make rules and regulations for operation and management of Indians forestry units, **and to restrict the number of livestock grazed on Indian range units to the estimated carrying capacity of the range, and to protect the range from deterioration, prevent soil erosion, to assure full utilization of the range,** but does not authorize him to enact legislation as to trespass and provide punishment by way

of a penalty.

The corporate charter of the tribe provides "no property rights of the Blackfeet Tribe, as heretofore constituted shall be in any way impaired by anything contained in this charter." (Subd. 7, R. p. 309), and the tribal constitution confers power to legislate upon the tribe (R. 300), and abrogates all rules and regulations of the Interior department in conflict therewith (R. 301).

It is clear that this grazing right of individuals on lands of the reservation is not abridged.

Nowhere in the law do we find any United States statute which provides that the straying of Indian cattle upon adjoining unfenced land constitutes an actionable trespass. Therefore, we must look to the tribal customs and laws for the rules controlling in such cases, which will be the subject next considered.

The trial court struck from the amended answer allegations pertaining to custom of the tribe to permit livestock to roam and graze upon unfenced areas and recognition of such right in tribal members (R. 31, 33, 34).

The general misconception of the extent of the rights of Indian Tribes is stated in Handbook of Federal Indian Laws "legal powers of Indian Tribes measured by the decisions of the courts are far more extensive than the powers which most Indian tribes have been permitted by energetic officers to exercise" (pg. 125). In the same publication it is stated that the laws and customs of the tribe in matters of

contract and property generally may be administered in the tribunals of the tribe and such laws and customs will be recognized by the court of the state or nation in cases coming before the courts (page 143).

See also Title 25 Sec. 218 U. S. C. which exempts from federal punishment persons "having been punished by the local law of the tribe."

The Department of the Interior, after the Wheeler-Howard Act of Congress was passed, had its solicitor, Nathan Margold, give an extended opinion for the guidance of that department on the effect of such act on Indian Tribes who organized under the act. The opinion was approved by Assistant Secretary of the Interior Chapman. This opinion embracing fifty three pages and containing a comprehensive consideration of Indian law appears in Volume 55, Decisions of the Department of the Interior, pages 14 to 67. The following are some of the conclusions of the solicitor based upon the statutes and decisions as appear from the syllabus:

"Conquest has brought the Indian tribes under the control of Congress, but except as Congress has expressly restricted or limited the internal powers of sovereignty vested in the Indian tribes such powers are still vested in the respective tribes and may be exercised by their duly constituted organs of government.

The acts of Congress which appear to limit the powers of an Indian tribe are not to be unduly extended by doubtful inference.

Attempts of administrative officials to interfere in the exercise by the Indian tribes of their

powers of self-government, or to supplant tribal authorities in the administration of these powers, have not terminated or impaired the legal rights and powers vested in the various Indian tribes.”

The long established custom of the Blackfeet tribe with respect to what constituted a trespass as between members of the tribe with respect to livestock appears in the form of a written law in Section 15 of Chapter 5 of the law and order code of the Blackfeet Tribe (R. 336), which reads as follows:

“Any Indian who shall go upon or pass over any cultivated or enclosed lands of another person and shall refuse to go immediately therefrom on the request of the owner or occupant thereof, or who shall wilfully and knowingly allow any livestock to occupy or graze on the cultivated or enclosed lands, shall be deemed guilty of an offense and upon conviction shall be punished by a fine not to exceed \$5 and the cost of the Court, in addition to any award of damages for the benefit of the injured party.”

This section requires a willful and knowing allowance by an Indian of livestock to occupy or graze on the **cultivated or enclosed** lands of another person. Since the defendants did not do the above prohibited acts on cultivated or **enclosed lands** they are not chargeable as trespassers.

The trial court was clearly in error in sustaining the motion to strike and in denying Brian Connolly permission to testify to the custom (R. 263), as such evidence would show, to aid in the interpretation of the written law, what the established practice had been in the past with reference to Indian livestock.

The matters in this division of the brief are pertinent to appellants' above specifications of error numbered 8, 9, 10 and 11.

4. Restriction of redirect examination of witness.

On cross examination witness Brian Connolly, a member of such council, was interrogated by counsel for plaintiff relative to a purported resolution of the Blackfeet Indian Tribal Council (R. 264-269), and a certified copy of such resolution was received in evidence as Plaintiff's Exhibit No. 11 (R. 265-268). Upon redirect examination of this witness, for the purpose of showing that the resolution had never been adopted and to definitely settle the matter a resolution was adopted repealing the resolution, the witness was asked, in substance, whether the question of the passage of such resolution had been a subject of discussion with the council. Plaintiff objected that the resolution spoke for itself and was the best evidence (R. 287). Counsel for defendants stated the purpose of the examination (R. 287), and the trial court sustained the objection as going into the proceedings of the council (R. 287).

In brief, the plaintiff by introduction of the copy of the resolution attempted to leave the impression that the resolution itself established a trespass by defendants under the evidence in the cause. The defendants sought to show that it did not apply to a case of this character and was not so intended and that to obviate the question it was expressly repealed. The learned trial judge evidently believed that the resolu-

tion introduced was a finality and could not be explained nor the intent of the tribal council could not be made the subject of an inquiry. The resolution uses the term "free grazing." Under the facts the defendants were not what might be termed free grazers as they owned their own land partly, and had lease on other land far in excess of the amount of land required for the grazing of the livestock owned or in their possession. Therefore, the redirect examination properly sought to show the inapplicability of the resolution's free grazing" clause and that same was not intended to apply to persons situated as the defendants and to obviate any further question of being construed as being applicable in such a situation the resolution was repealed.

The resolution of the tribal council in as much as it is an act of a corporate body, is similar to an ordinance of a municipal corporation.

Parol evidence is admissible to explain an ambiguity in a municipal ordinance.

Village of Donovan v. Donovan.
86 N. E. 575 (Sup. Ct. Illinois).

The minutes, if any, of the meeting of the council were not in evidence. However, although prima facie evidence of corporate acts the minutes are not conclusive evidence and parol evidence is admissible to show what actually took place.

Cox v. First National Bank,
52 Pac. (2) 524, 10 Cal. App. (2) 302,
Franciscan Hotel Co. v. Albuquerque Hotel Co.,
24 Pac. (2) 718, 37 N. M. 456.

The trial court consequently was in error as indicated in specification of error No. 12 above.

5. Denial of motions for a new trial.

The questions of fact and law already considered were presented to the District Court by the separate motions of the defendants for a new trial (R. 59-65, 67-70), and we respectfully refer the Court to what has been heretofore said.

Among the grounds assigned by Brian Connolly in his motion were "accident and surprise" which ordinary prudence could not have guarded against (R. 60), and in support of this assignment his affidavit (R. 72, 73) recites:

"That prior to the time the above entitled action was set down for trial and at the time when he retained E. J. McCabe of Great Falls, Montana to act as his attorney in said action, he inquired of his said attorneys as to whether he could have a trial of said cause by a jury and was informed by his said attorney at that time that the above entitled action was an equitable action for injunctive relief with the claim for compensatory damages as relief incidental to the main relief sought by way of injunction, and that said action was of a character known and referred to generally as an equitable action in which defendants were not entitled to a jury trial, and that since no penalty or forfeiture by way of punishment was sought in the action that he could not obtain a separation of causes of action and a trial by jury. That affiant verily believed and verily believes the statement made by his attorney and that in reliance upon said statement affiant did not request that said action or any issue therein be tried by a jury, and that had affiant believed

that the plaintiff would seek to recover a money penalty or a money forfeiture in said action by way of punishment of this defendant, that affiant would have requested the issue of punishment to be submitted to a jury in said cause.”

It will be observed from a reading of the complaint that the remedy sought is an equitable remedy of injunction and incidental damages. No actual damages were proven at the trial. Injunctive or equitable relief was granted. No intimation is set forth in the complaint that a penalty of forfeiture would be sought as against the defendants. On examining the complaint and its allegations and prayer for relief, the attorney for Brian Connolly informed him that he was not entitled to a jury trial. Had there been any intimation in the pleadings that a forfeiture would be sought by way of punishment, counsel for said defendant could then have rightfully informed Mr. Connolly that he would be entitled to have the forfeiture issue submitted to a jury. Therefore, in the present case, independent of whether or not Mr. Connolly would have waived a jury under such advice, the objection is that he was misled by the complaint, whereby he was not given an opportunity to decide whether he would or would not have the penalty or forfeiture issue submitted to a jury. Assuming for argument only that plaintiff would be entitled in this proceeding to join an equitable cause of action with an action for a forfeiture, which in its nature is an action at law, and failed to separately state and number, same would be subject to a motion to have plaintiff separ-

ately state and number his separate causes of action. There is nothing in the complaint to intimate that there are separate causes of action, one for equitable relief and one for relief at law by recovery of a penalty (under the old practice) and therefore, a party pleading in the manner in which the complaint pleads the facts could, by such subterfuge, defeat a defendant's remedy by motion to separately state and number causes of action, and defeat his right to a jury trial.

The trial court erred in denying the motions for a new trial.

6. Grazing regulations.

During the trial of this cause below reference was frequently made by plaintiff's counsel to grazing regulations violated (R. 270-272) as establishing actionable trespass. The grazing regulations appear in the record pages 231 to 243, inclusive. At page 238 of the record certain things are stated as constituting a trespass. None of the provisions is made applicable to a case where a permittee's stock following a natural characteristic strays upon unfenced adjoining land as is presented by the evidence at bar.

CONCLUSION

It is respectfully submitted that the entire record discloses **a complete failure of proof** of the material allegations of the complaint and that the judgment of the District Court in the cause at bar should be reversed.

E. J. McCabe

S. J. Rigney

Attorneys for Appellants Brian Connolly
and Daniel Connolly.

**United States
Circuit Court of Appeals
For the Ninth Circuit**

BRIAN CONNOLLY and DANIEL CONNOLLY,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

Brief of Appellee

John B. Tansil,
United States Attorney,
Merle C. Groene,
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Attorneys for Appellee.

**Upon Appeal from the District Court of the United
States for the District of Montana.**

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United States Circuit Court of Appeals

BRIAN CONNOLLY and DANIEL CONNOLLY,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLEE

APPELLANTS' STATEMENT OF THE CASE

Reluctantly, we are compelled to disagree with a part of appellants' statement of the case. This applies to appellants' statement of the evidence with reference to their specifications of error numbers 1 to 7 inclusive.

In appellants' statement of the case, certain material evidence which was before the trial court is omitted. Also, in appellants' argument, (R. pp. 16-29) inc.) the same omissions are made.

In specifications of error under which the claim is made that there was not sufficient evidence before the trial court to support findings of fact and judgment, we feel that it is necessary to call this court's attention to these omissions. For instance, we fail to find in appellants' brief the following:

1. Witness Stephenson testified that in making his investigation he observed no other cattle bearing a different brand than Mr. Connolly's, (R. 140) and didn't recall noticing any other brands other than Mr.

Connolly's. (R. 141) Again (R. 142)

“The Units are set up, the carrying capacity. Unit lines are established, and we expect more or less conformity to those lines, in order that we can keep tract of the stock on the Units.”

and as to having any complaints,

“I have had them call my attention to the fact that they had been out there in trespass.” (R. 143)

Again (R. 145) he testified that the stock that an Indian permittee is allowed to take in must be within the numerical number contained in the grazing permit. Again (R. 146) witness stated

“First time I met Mr. Connolly after I came on duty, it was a few days after I came on duty, he came into my office and we talked over this trespass situation, and I advised him then that it would be necessary to restrict his cattle, at least a whole lot more than they had been in the past to the area that was permitted to him.”

And again (R. 147)

“Mr. Connolly told me then that those were Indian stock; that they could run anywhere on the Reservation that he wanted them to.”

Witness Girard testified that he counted forty-eight head of horses bearing the Connolly brand on the lands involved in this action. (R. 149-150). Again there were thirty-six head of cattle with the Dan Connolly brand on the land involved. Also one hundred head of cattle belonging to Mrs. Sinclair. (R. 151). Also forty-five head of cattle belonging to Ryan. (R. 151). Also forty-two head of cattle belonging to Payne, these cattle being brought to the cattle range by Mr. Payne. (R. 151-152). These cattle ran with the Connolly cattle.

(R. 151). And when he saw these cattle on the lands in question he saw some of Mr. Connolly's cattle and horses with them. (R. 153). Connolly took care of cattle for other people. (R. 126-127).

3. Witness Barrett testified that he counted twenty-five head of cattle and twenty-five head of horses on the land in question in 1941. (R. 158). Again, every day that he passed through that area he saw horses and cattle on the Blood allotments. The horses bore the Connolly brand. These cattle belong to both appellants. (R. 161).

4. Witness Young saw thirty-two head of horses bearing the Connolly brand. There were no other horses or livestock other than the Connolly livestock. (R. 166). Again, witness testified that the Connolly horses had been encountered so many times that upon this occasion they counted the horses. (R. 167).

5. Witness Stephenson testifying again stated that at the time this action was commenced appellants had no other lands on the Blackfeet Indian Reservation to which they were entitled to the use and occupancy, but since the commencement of the action they had acquired additional lands. (R. 173).

In addition to the foregoing, there are other and further facts in the record which appellants have not called to the attention of this court, either in the statement of case or in their argument.

APPELLANTS' CONTENTIONS

Fourteen specifications of error are made by appel-

lants but briefly they may be grouped for argument into the following:

1. The evidence was and is insufficient to sustain the judgment.
2. The trial court had no jurisdiction to impose a judgment of \$258.00 against appellants.
3. The lower court erred in sustaining a motion to strike portions of the amended answer of Brian Connolly.
4. The lower court erred in denying appellants' motion for a new trial.

We will address ourselves to these propositions as advanced in appellants' brief.

ARGUMENT

1.

Appellants claim that the evidence was and is insufficient to sustain the judgment. This claim involves the question of the sufficiency of the evidence to sustain the findings of fact by the trial court. We respectfully submit that the burden is upon appellants here to show that the evidence is wholly insufficient to support the findings and the judgment, and in appellants' brief they have wholly failed to sustain this burden.

We must bear in mind that this case was tried to the lower court without a jury under a situation where, under the rules of court, appellants were in the position of having waived a jury.

A finding of fact by the court sitting without

a jury is equivalent to a verdict and hence will be disturbed only when it is clearly erroneous. An appellant court will not disturb the findings of the trial court on questions of fact unless it be made to appear that the latter court is clearly in error in its conclusions.

Vineyard L. S. Co. c. Twin Falls, etc., Co., 9th Circuit (Ida.) 245 F. 30.

Standard Oil Co. v. Ship Owners, etc., Co. (CCA—Cal) (17 F (2) 366)

Findings of court on questions of fact when jury has been waived are conclusive in the courts of review.

Dooley v. Pease, 180 U. S. 126-45, L. ed. 457.

Findings of trial court on questions of fact, unless manifestly erroneous, will be affirmed.

(CC Ore.) **W. H. Markell & Co. v. Mutual Benefit, etc., Co.**, 63 F (2) 193.

Where a case is tried by the court without a jury its findings upon questions of fact are conclusive in the appellate court.

Empire, etc., Co. v. Bunker Hill, etc., Co., (Ida) 114 F 417.

That appellants waived a trial by jury is borne out by the record:

Rule 38 of the Rules of Civil Procedure for the District Court of the United States preserves the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States; but, under the rule a litigant, in a civil action, who does not seasonably demand a jury, as provided by the rule, waives the right and may not have a jury trial.

United States v. Strewl. C.C.A. N.Y. 1938, 99 F. (2d) 474, certiorari denied.

Strewl v. United States. 1939, 50 S. Ct. 489, 306 U. S. 668, 83 L. Ed. 1063.

The law is now well established that a jury trial as a matter of right is waived by failure to serve demand for a jury trial as required by Rule 38(d).

Suffin v. Springer, D.C. N.Y. 1940, 1 F.R.D. 256.

Alfred Hofmann, Inc. v. Textile Machine Works, D.C. Pa. 1939, 27 F. Supp. 431.

MacDonald v. Central Vermont Ry., D. C. Conn. 1940, 31 F. Supp. 298.

Further as to willful intent, we quote from the decision of the lower court (R. 40) as follows:

“While there are some discrepancies in the testimony of the witnesses as contended by counsel for defendants, there is sufficient credible testimony to satisfy the court that the defendants have been trespassing as alleged in open violation of the statute and regulations, resulting in damage to the property of others, although warned by the Government representatives on the reservation to desist. That the attitude and intent of the defendant, Brian Connolly is clearly shown in his violation of the temporary injunction issued by this court in this cause. On many occasions the witnesses observed the Connolly horses and cattle in trespass both before and after the commencement of this suit. The evidence shows that his livestock scattered for a distance of ten to twelve miles from his range unit. His explanation was that the cattle had strayed, and in answer to a question in that respect replied that they had always done that.”

So that we respectfully submit that appellants have no standing here on this appeal to question the sufficiency of the evidence to support the findings and judgment as a careful reading of the record shows ample facts upon which the lower court based its deci-

sion. As we have heretofore indicated, the argument of appellants on the claimed insufficiency of the evidence is based upon a misconception of the evidence that was offered, in that appellants have failed to refer to a great many matters of evidence, a few of which we have called to the attention of this court heretofore in this brief. For instance, on page twenty-five appellants state that the records fail to show a single incident when either of the defendants failed to remove their livestock from the land, yet a reference to the record disposes of this contention. For instance, (R. 146-147) where witness Stephenson testified that he talked the trespass situation over with Mr. Connolly and told him it was necessary to restrict his cattle, at least a whole lot more than he had been in the past and Connolly told Mr. Stephenson that the cattle were Indian stock and that he could run them anywhere on the Reservation that he wanted to. Again, on page twenty-eight of brief, appellants say that the cattle were grazing on open, unfenced lands. This is taken from the testimony of appellant Brian Connolly, but the Government witnesses testified differently. For instance, at pages 136 and 137 of the record, testimony of the witness showed that the cattle ranges on the Reservation were all fenced as of November, 1941, and at all times thereafter. It is therefore impossible to answer the arguments of appellant as to the evidence when they have omitted a great many material portions thereof. It is respectfully submitted that this portion of appellants' argument is without merit.

2.

Appellants claim that when the court awarded damages in the sum of \$258.00 for the trespassing stock that this was not justified by the pleadings and by the evidence and error is claimed therein. This portion of the argument is discussed on pages twenty-nine to forty-one inclusive of their brief. The lower court awarded to the Government the sum of \$258.00 damages or penalty as provided by Section 179, Title 25, USCA. This provides that every person who drives or otherwise conveys any stock of horses, mules or cattle to range and feed on any lands belonging to any Indian or Indian tribe without the consent of such tribe shall be liable to a penalty of \$1.00 for each animal of such stock. The record shows that there were twenty-five horses in wilful trespass on July 5, 1941, forty-eight horses and twenty-five cattle in similar trespass on August 6, 1941, twenty-five horses and forty-five cattle in wilful trespass on August 8, 1941, thirty-two horses on August 13, 1941, and thirty-six horses and twenty-two cattle on October 21, 1941, making at \$1.00 a head a total of \$258.00. As was held by the Supreme Court of the State of Montana, in **Cook v. Hudson**, 110 Mont., 263, the act was designed to protect Indian lands against harmful trespass and the statute is directory and not mandatory.

Since the record is replete with sufficient facts to justify wilful trespasses on the part of the defendant, we fail to see wherein this argument can have any basis. Throughout the entire argument of appellants

they attempt to make the new Federal Rules of Civil Procedure inapplicable to the case at bar so as to come under the authority of the **United States v. Ash Sheep Co.** (Mont.) 250 F. 591, 64 L. Ed. 507.

As their basic authority therefore, they cite Sub-division (2) of Paragraph (a) of Rule 81 apparently because it contains the clause “* * * and forfeiture of property for violation of a statute of the United States.” With this clause as their foundation, the defendants then endeavor to point out that the instant trespass action becomes an action for “forfeiture of property” under Section 179, Title 25, U.S.C. Their quotation closes with the clause, “* * * shall forfeit the sum of one dollar for each animal of such stock.” Before proceeding further, we desire to call the Court’s attention to the fact that the defendants have not correctly quoted the language of Section 179, Title 25, U.S.C. because that section does not contain the word “forfeit”. But, even if it did, there is no merit to the defendants’ argument that Rule 81 (a) (2) would have any application to the instant action, which as stated before, is an action in trespass and no stretch of the imagination can throw it under a “* * * forfeiture of property for violation of a statute of the United States,” as required by the rule. Anyone who is familiar with Federal procedure readily recognizes that the “forfeiture of property for violation of a statute of the United States,” as set forth in Rule 81 (a) (2), refers to actions involving violations of the Federal

Laws, such as the Pure Food, Drug and Cosmetic Act, the Internal Revenue Laws, Custom Laws, Indian Liquor Laws, and the like. These are generally actions in rem, and usually follow the proceedings in Admiralty in so far as such procedure is applicable. It is therefore apparent that the defendants have misquoted Section 179, Title 25, U.S.C. and misinterpreted the purpose of Rule 81 (a) (2) in their desire to escape established procedure and the decision of this Court. Their constant reference to “a forfeiture of \$258.00” finds no basis in the law or facts of the case.

The case of **United States v. Ash Sheep Company**, D.C. Mont. 1916, 229 F. 479, affirmed C.C.A. 1918, 250 F. 591, and affirmed 1920 40 S. Ct. 241, 252 U.S. 159, 64 L. Ed. 507, cited by the defendants, was decided by the Supreme Court of the United States in 1920, under the old Equity Rules long before the adoption of the present Rules of Civil Procedure for the District Courts of the United States, so it can hardly be considered as authority for procedure under the new rules.

We all recognize that the new rules merely abolish differences in procedure between law and equity and do not affect the differences between legal and equitable rights and remedies.

Sun Oil Co. v. Burford, C.C.A. Texas 1942, 130 F. (2d) 10, vacating 124 F. (2d) 467, certiorari granted, 1943, 63, S. Ct. 265, 87 L. Ed.

But by the new rules the distinction between legal and equitable forms of action have been abolished so that it is now only one form of civil action. And that, as

the court pointed out in **Columbia River Packing Association v. Hilton**, D. C. Or., 1940, 34 F. Supp. 970, damages can properly be claimed and allowed in an action for an injunction.

And the pleadings put in issue facts necessary under Section 179, Title 25, U.S.C., and supported such relief under Rule 54 (c) even though not specially prayed for in the complaint. Furthermore, it is noted (R. 86) that at the commencement of the action counsel for the Government in opening statement specifically referred to the penalty statute without any response of appellants or their counsel or demand for jury trial of that issue. This, we respectfully submit, is a further waiver of any claim or demand for a jury or claim that the question of damages under Section 179 was before the trial court.

The Montana cases that the defendants have cited as sustaining their contention that damages may not be granted in an equity action are not applicable here, because, Federal courts must grant equitable remedies in accordance with their own rules without limitation or restraint by state legislation,

Black & Yaten v. Mahogany Ass'n., C.C.A. Del. 1942, 129 F. (2d) 227, reversing D.C. 34 F. Supp. 450, certiorari denied 1943, 63 S. Ct. 76, 87 L. Ed.

Geist v. Prudential Ins. Co. of America, D.C. Pa. 1940, 35 F. Supp. 790.

and it is well established that, as hereinbefore cited, damages can be had in an action for injunctive relief.

The trial court in its decision (R. 39-51 inc.):

“Under the practice established by the rules of civil procedure there is no distinction between actions at law and suits in equity. To permit the imposition of a penalty it is not necessary to consider whether this case should have been begun originally as a law action or as a suit in equity, and, it does not appear that it would make any difference whether counsel had specifically demanded in the complaint the remedies to which plaintiff would be entitled. The court should grant the relief to which a party is entitled even though demand for such relief has not been made in the pleadings. (Rule 54 (c), 28 U. S. C. A. following Sec. 723c).

“As it seems to the court, whether the complaint in this action is regarded as an action at law, with equitable relief incidentally prayed for, or whether the complaint be considered as an action at law and a suit in equity joined, the parties are, as a matter of right, entitled to a trial by jury on all legal issues raised, if demand for a jury is made as the rules provide. *Fitzpatrick v. Sun Life Assurance Co.*, 1 F.R.D. 713; *Ransom, et al vs. Staso Milling Co.*, 2 F.R.D. 128.”

And appellants proceed further on page thirty-five to forty-one inclusive to argue that the United States had no jurisdiction in an action of this kind for the reason that the sole authority belongs to the Indian tribes under their treaties with the Government. Since we propose to discuss this matter later on in another subdivision in this brief we will omit further reference thereto at this time.

3.

The next error complained of is that the lower court erred in sustaining the Government's motion to strike certain allegations of the amended answer of the de-

fendant Brian Connolly and at pages forty-two to fifty-three inclusive of their brief, appellants argue at length as follows: (a) That the defendant had written authority to graze a specific number of livestock on any part of the Blackfeet Indian Reservation. (b) That the defendant had a vested right by treaty to graze on the unfenced lands of the Indian Reservation; and (c) That defendants had a right by custom to let their livestock roam and graze over the lands thereon.

(a) Defendants' "On-and-Off" Theory of Defense.

In support of their first contention, the defendants allege (Line 20, Paragraph I, Page 4 of the Defendants' Further Answer, to and including Line 12, Paragraph I, Page 5) their theory of "on-and-off grazing privileges," which they claim is based on recognized custom. (R. 27-28). It is the Government's contention that such allegations were immaterial and were subject to its motion to strike; because, the defendants have absolutely no right to trespass upon the lands involved in this action; that said lands are not near the lands upon which the defendants are permitted to run their livestock as to be susceptible to the natural drifting of said livestock thereon; and that the defendants have no "on-and-off grazing privileges," or any other rights whatsoever, on the lands and premises which are made the subject of this action.

Lines 17 of Paragraph I on Page 5 of said answer, down to and inclusive of the word "complaint" on line 26 of said paragraph and page, were likewise subject

to the plaintiff's motion to strike in that they contained allegations relative to the defendants' rights in other lands, which are not involved in and the subject of this action. Such allegations merely tend to cloud the issues in the case at bar and are therefore immaterial. They are neither admissions, nor denials of any of the averments contained in the complaint, nor authorized by law providing for the filing of a cross-complaint.

Securities State Bank of Roy v. Melchert, 66 Montana, 535, 538, 216 P. 340; Rule 12f of the Rules of Civil Procedure for the District Courts of the United States; Section 9166, Revised Codes of Montana, 1935.

We are at a loss to understand, why the defendants, are attempting to invoke "on-and-off grazing privileges" as a defense in this case. Such privileges, contrary to the defendants' allegations, are based on well-defined regulations which have been duly and regularly promulgated by the Secretary of the Interior in accordance with the Acts of Congress. (See Section 71.20, Title 25, Code of Federal Regulations of the United States of America). They are not the outgrowth of established custom but were instituted to take care of certain financial inequities which do not arise in this action. Such privileges apply only to lands on which the permittee has a right to graze. They arise only when fixed by contract and are specifically contained in a grazing permit. Such "on-and-off" grazing privileges" cannot, by any stretch of the imagination, be used as a defense for the defendants' trespasses in

the case at bar, or interpreted as a license for said defendants to trespass on the lands of others.

(b) Defendants' Defense of Vested Right by Treaty.

The second type of defense set forth by the defendants (Paragraphs II and III of their answer) is an attempt to claim a vested right to graze their cattle and horses on the unfenced lands of the Blackfeet Indian Reservation, which they contend is based on a treaty right established in 1855 under the Treaty of Laramie.

A—Congress May Abrogate Indian Treaties.

We will not quote from that treaty because anyone who is familiar with Indian law knows that prior to 1870 it was the policy of Congress to deal with Indians by treaty; but, it is now, and for a long time has been, well-established law that the Congress may abrogate the provisions of an Indian treaty.

Taylor v. Morton, 2 Curtis 454;

The Clinton Bridge, 1 Walsworth 155;

Cherokee Tobacco, 11 Wall. 616 (1870);

Lone Wolf v. Hitchcock, 187 U. S. 553, 565;

Ward v. Race Horse, 163 U. S. 504.

When one considers Section 6, c. 576 of the Act of Congress of June 18, 1934, 48 Stat. 986; 25 U.S.C. 466, which reads as follows:

“The Secretary of the Interior is directed to make rules and regulations for the operation and management of Indian forestry units on the principle of sustained-yield management, **to restrict the number of livestock grazed on. Indian range units to the estimated carrying capacity of such**

ranges, and to promulgate such other rules and regulations as may be necessary to protect the range from deterioration, to prevent soil erosion, to assure full utilization of the range, and like purposes.” (Boldface ours.)

and the rules and regulations promulgated thereupon (Sections 71.1 to and inclusive of 71.26, Title 25, Code of Federal Regulations of the United States of America) there can be no question about the abrogation of any rights that the defendants may have acquired under the Laramie Treaty in 1855.

B—Ratification of Regulations by Blackfeet Tribe.

The Blackfeet Tribe of the Blackfeet Indian Reservation in compliance with the provisions of the Wheeler-Howard Act (June 18, 1934, c. 576, sect. 16, 48 Stat., 987, 25 U.S.C. 477, as amended by the Act of June 15, 1935, 49 Stat. 378, 25 U.S.C. 478) became an organized Indian Tribe and was granted a Corporate Charter by the Secretary of the Interior on June 18, 1936. Paragraph 3 of Article 5 of its Charter provides:

“No action shall be taken by or in behalf of the Tribe which is in conflict with regulations authorized by section 6 of the Act June 18, 1934, or in any way operates to destroy or injure the tribal grazing lands, timber, or other natural resources of the Blackfeet Indian Reservation.” (R. 305)

Thus, by its own action the Blackfeet Tribe has ratified Section 6, c. 576 of the Act of Congress of June 18, 1934, 48 Stat. 986, 25 U.S.C., 466 (above cited) and the rules and regulations promulgated thereunder by the Secretary of the Interior. As a matter of fact, the Blackfeet Tribe by resolution adopted by its Business

Council in regular session assembled on November 2, 1939, (Resolution No. 35) (R. 265) went much further than the Secretary of the Interior to eliminate any grazing rights, such as the defendants claim, by stating that, "Free grazing privileges on the Blackfeet Reservation are abolished." It becomes apparent that if the defendants ever had any rights under the Laramie Treaty of 1855, to graze their livestock on the unfenced lands of the Blackfeet Indian Reservation, that such right has been abrogated in toto by the above-cited Act of Congress and the specific action of the Blackfeet Indian Tribe. The Laramie Treaty therefore no longer affords the defendants a defense for their unlawful trespasses. Their allegations in relation thereto, as contained in their answer, are immaterial and impertinent and were properly stricken therefrom in accordance with the appellees' motion to strike.

(c) Defense of Long Established Custom.

The defendants' third defense in avoidance (Paragraph I at the bottom of Page 6 of their answer and continuing on Page 7 thereof) sets forth a right under long established custom, to allow their livestock to roam and graze on the lands of the Reservation. Such a defense is kindred to their "Defense of Vested Right by Treaty" hereinbefore discussed. All that has been said in relation thereto likewise applies herein. The allegations thereof are subject to the plaintiff's motion to strike in that they are redundant, immaterial and impertinent.

Custom Must Give Way to Established Law.

If the custom, which the defendants allege, had ever been established, which we do not admit, such a custom would have to give way to the expressed legislation which now prohibits any such practices.

Wolfe v. Shell Petroleum Corporation, 83 F. (2d) 438, cert. denied 57 S. Ct. 19, 299 U. S. 553, 81 L. Ed. 407.

Wolfe v. Texas Company, 83 F. (2d) 425 cert. denied 57 S. Ct. 15, 299, U. S. 553, 81 L. Ed. 407.

Swift, etc. Co. v. U. S., 105 U. S. 691, 26 L. Ed. 1108.

Walker v. Western Transp. Co., 3 Wall. 150, 18 L. Ed. 172.

Cudahy Packing Co. v. Narzisenfeld, 3 F. (2d) 576.

Ettien v. Drum 32 Mont. 311, 318, 80, P. 369.

Penn v. Oldhauber, 24 Mont. 287, 61, P. 649.

It is respectfully submitted that the motion to strike was properly sustained.

4.

Appellants next claim that the lower court was in error in denying the motion for a new trial, but the matters involved are all covered elsewhere in the briefs and for that reason no further argument will be made at this point.

SUMMARY

This action, in regular form, was brought by the United States of America, as plaintiff, against the defendants, who are Indian Wards of the United States Government and members of the Blackfeet Tribe of

Indians, to obtain injunctive relief and damages for the unlawful trespassing of the defendants' livestock on allotted Indian lands of the Blackfeet Indian Reservation, on which the defendant have no right or interest.

All that the plaintiff asked was that the defendants be made to realize that they must comply with the Acts of Congress and the rules and regulations promulgated thereunder insofar as they relate to the grazing of livestock on the Reservation; and, that even a member of the Blackfet Tribal Council, such as the principal defendant, Brian Connolly, happens to be, cannot defy the Indian Service and refuse to comply with established law and order by attempting to invoke Tribal Regulations of his own creation. That regardless of their Indian status, the defendants should realize that they have no right to trespass upon the allotted Indian lands of their less ambitious and less fortunate fellow tribesmen in violation of the rules and regulations that have been established by the Secretary of the Interior, in accordance with the Act of Congress.

The question submitted to the trial court was: Does an Indian person, who is a ward of the Government of the United States and a member of the Blackfeet Tribe of Indians, have to comply with the grazing rules and regulations of the Secretary of the Interior on the Blackfeet Indian Reservation; or, may such an Indian person disregard the rules and regulations of the Secretary of the Interior and without restrictions allow his personally-owned livestock, and livestock in which he may have an interest, to run-at-large on the Black-

feet Indian Reservation?

Indian Lands Distinguished From Public Domain

Before the western part of the United States became settled, and when commonly known as the "Great Open Spaces," it was the policy of Congress to encourage settlement of the public domain—practically without any sort of restriction. In line with this policy, the doctrine of "Implied License" (**Buford v. Houtz** 133 U. S. 320) had its inception; whereby, it was legally recognized by the Supreme Court of the United States that one had a right to graze one's livestock and allow them to run-at-large on the open ranges of the public domain. In these early days of the west, if a settler or homesteader happened to be surrounded by public domain, on which livestock ran-at-large, it was the burden of such settler to "fence-out" if he wished to protect his lands from livestock trespasses. When the public domain became more settled, the doctrine of "Implied License" became more limited (**Light v. United States**, 220 U. S. 553) and finally the theory of the "open range had to give way to the theory of the "greatest good for the greatest number." (**United States v. Tygh Valley Land Co.** 76 F. 694.) Herd districts were later established which required livestockmen to "fence-in" rather than the land owner to "fence-out." The Supreme Court of the United States subsequently placed additional restrictions on the livestock interest (**Lazarus v. Phelps**, 152 U. S. 81; and **Light v. United States**, 220 U. S. 523) as the public

domain gave away to settlement. Finally the Congress of the United States realizing that the public domain could no longer carry an unrestricted livestock industry passed the Taylor Grazing Act of June 28, 1934, (48 Stat. 1269, Sects. 315, 315n, Title 43, U. S. C.) which has completely eliminated the unrestricted use of the public domain and done away with the "open range" of the Old West.

Long before the Civil War, Congress began to make use of its treaty-making powers with the Indians and started to set aside Indian reservations for the exclusive use of the various Indian tribes. Its paramount authority over such reservations and the Indians occupying them has never been questioned. (**Lone Wolf v. Hitchcock**, 187 U. S. 553.) As the white man's frontiers pushed into the Indian country, these various Indian reservations decreased in area from time to time until the Indian country was no longer a "hunting ground" for its Indian occupant. If the Indian were to survive he had to adjust himself to the life of an agistor with the hope that he might ultimately gather flocks or herds of his own or become an agriculturist. The westward march of civilization ultimately surrounded the Indian reservation and the greedy white livestock interest began to trespass thereon—well realizing that the Indian country was not a part of the public domain. Congress was forced, in the protection of its backward Indian wards, to pass stringent legislation to keep the white man's livestock, and those of some of the more ambitious Indians, off the Indian lands generally. Section

179 of Title 25, U.S.C., which became an Act of Congress on March 1, 1901, (c. 676, Section 37, 31 Stat. 871) is typical of such legislation and prohibits every person, white or Indian, from trespassing on "any lands belonging to any Indian or Indian tribe." It is a penal section and provides for a "penalty of \$1 for each animal of such stock." This section is one of the controlling factors of the measure of damages in the case at bar and contributes such penalty in addition to the actual damages suffered by the plaintiff's Indian allottees, as hereinafter set forth.

Congressional protection has thus enabled many individual Indians to accumulate flocks and herds of their own. Some of these Indians are today among the nation's outstanding livestock raisers. The development of the Indian livestock industry on an Indian reservation, such as the Blackfeet Indian Reservation, has its counterpart in the development of the white man's livestock industry of the west. Congress, as it had the early settlers of the West, again encouraged the Indian livestock man. At first, the Indian stockman too was allowed to graze his livestock on his reservation without restriction. But paralleling the development of the Old West, the abundance of Indian livestock, on the limited ranges of the Indian Reservations, soon reached a point when rules and regulations had to be promulgated for the "greatest good for the greatest number" of the Reservations' Indian population. Congress was forced to legislate against the unrestricted grazing of livestock on an Indian reservation, by an Indian, or

his lessee or permittee. It directed the Secretary of the Interior to protect the Indian Reservation ranges from deterioration. Thus the Act of Congress of June 18, 1934 (48 Stat. 986; 25 U.S.C. 466) had its inception. It reads as follows:

“Section 466. Indian forestry units; rules and regulations:

The Secretary of the Interior is directed to make rules and regulations for the operation and management of Indian forestry units on the principle of sustained-yield management, to restrict the number of livestock grazed on Indian range units to the estimated carrying capacity of such ranges, and to promulgate such other rules and regulations as may be necessary to protect the range from deterioration, to prevent soil erosion, to assure full utilization of the range, and like purposes. (June 18, 1934, c. 576, Sec. 6, 48 Stat. 986.)”

The rules and regulations which had been promulgated by the Secretary of the Interior in accordance with the expressed mandate of the Act of Congress of June 18, 1934, may be found and are designated as Sections 71.1 to and inclusive of 71.26, Title 25, Code of Federal Regulations of the United States of America. They apply to Indians as well as non-Indian persons. Section 71.3 defines the objectives of the regulations. Section 71.11 treats with Indian competitive bidding and favors those Indians owning less than 250 head of cattle or 1250 head of sheep. Section 71.21 of the regulations deals with trespass. It was amended on March 24, 1942, and now reads:

“Sec. 71.21 TRESPASS. The owner of any livestock grazing in trespass on restricted Indian

lands is liable to a penalty of \$1 per head for each animal thereof together with the reasonable value of the forage consumed and damages to property injured or destroyed.

The following acts are prohibited:

- (a) The grazing upon or driving across any restricted Indian lands of any livestock without an approved grazing or crossing permit, except such Indian livestock as may be exempted from permit.
- (b) Allowing livestock not exempt from permit to drift and graze on restricted Indian lands without an approved permit.
- (c) The grazing of livestock upon restricted Indian lands within an area closed to grazing of that class of livestock.
- (d) The grazing of livestock by a permittee upon an area of restricted Indian lands withdrawn from use for grazing purposes to protect it from damage by reason of the improper handling of the livestock, after the receipt of notice from the Superintendent of such withdrawal, or refusal to remove livestock upon instructions from the Superintendent when an injury is being done to the Indian lands by reason of improper handling of livestock.

(R. S. 2117; 25 U.S.C. 179) (Reg. Asst. Sec., March 24, 1942, 7 F. R.'')

Section 71.5 of the Regulations, limits the carrying capacity of Indian Reservations and specifically prohibits Indian allottees from trespassing on adjacent Indian range lands.

From these regulations, it will be noted that the livestock man on an Indian Reservation—be he Indian or otherwise—has always been required to avoid trespassing on Indian lands. In other words, it is the

duty of the livestock man to keep his livestock off the lands of others and not the duty of the Indian allottee to protect his lands against such trespasses.

Thus there can be no doubt as to the existence of established rules and regulations for the administration by the Indian Service of grazing rights and privileges on the Blackfeet Indian Reservation. Neither can there be any question about such rules and regulations applying to Indian persons on their own reservations as well as non-Indian permittees.

For some reason or other, appellants introduced as evidence in the case at bar, copies of the "Corporate Charter of the Blackfeet Tribe of the Blackfeet Indian Reservation, Montana," the "Constitution and By-Laws of the Blackfeet Tribe of the Blackfeet Indian Reservation, Montana," and the "Law and Order Code of the Blackfeet Indian Tribe." We are at a loss to understand why the record was so encumbered because none of these documentary exhibits have any bearing whatsoever on the case. If appellants are trying to infer that any of these exhibits have given the Blackfeet Tribal Council the authority to administer grazing rights on the Blackfeet Indian Reservation, Sub-paragraph 3, under Sub-paragraph (b) of Paragraph 5, on page 2 of the Corporate Charter, should correct their mistake because it specifically states:

"3. No action shall be taken by or in behalf of the Tribe which is in conflict with regulations authorized by section 6 of the Act June 18, 1934, or in any way operates to destroy or injure the tribal grazing lands, timber, or other natural resources

of the Blackfeet Indian Reservation.”

The Section 6 of the Act of June 18, 1934, referred to in the Corporate Charter, as above quoted, is the Act of Congress which directed the Secretary of the Interior to promulgate the necessary rules and regulations to protect Indian ranges from deterioration. It is conclusive that the administration of all grazing rights and privileges on the Blackfeet Indian Reservation had been reserved to the Secretary of the Interior pursuant to the Act of Congress; and that the Corporate Charter of the Blackfeet Indian Tribe recognizes such fact in positive language so as to avoid any conflict relative to grazing rights on the Blackfeet Indian Reservation such as appellants are attempting to inject into this action.

It is respectfully submitted that the judgment of the lower court was correct in each and every particular.

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United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

BRIAN CONNOLLY and DANIEL CONNOLLY,
Appellants,

VS.

UNITED STATES OF AMERICA,
Appellee.

APPELLANTS' REPLY BRIEF

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Upon Appeal from the District Court of the United
States for the District of Montana.

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United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

BRIAN CONNOLLY and DANIEL CONNOLLY,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANTS' REPLY BRIEF

Appellee's brief herein contains a number of statements and conclusions which require brief comment. We shall discuss same in the order of appearance in that brief.

1. Alleged Ommissions in Appellants' Statement of the Case.

On the first page of brief the appellee states that

appellant omitted reference to the fact that Witness Stephenson testified “that in making his investigation he observed no other cattle bearing a different brand than Mr. Connolly’s (R. 140) and didn’t recall noticing any other brands other than Mr. Connolly’s” (R. 141). It is true Witness Stephenson did make such statements substantially in certain answers, but by such answers the witness did not intend to convey the impression that he did not see other cattle than Mr. Connolly’s grazing on the land, as it clearly appears there were other cattle bearing other brands on the land at the time. The following questions and answers of the Witness Stephenson appearing on pages 140 and 141 of the record, referred to by appellee, show he saw other cattle at the time:

“Q. And so that I may understand you, and be correctly advised, then at no time when you went out and observed Mr. Connolly’s cattle grazing on any of the land described by you in your testimony, did you see any cattle or horses or sheep grazing that same area?

A. If you put it that way, yes.

Q. So, how many cattle did you see grazing in that area at that time, other than Mr. Connolly’s?

The Court: “That area.” You must be fair with the witness. That might not be a very comprehensive question to the witness. Describe it more definitely.

Mr. McCabe: I will.

Q. On the allotments that you examined at that time, how many other cattle did you see grazing on those allotments?

A. Do you refer to the groups of cattle that we counted in trespass, I don’t recall noticing any other brands other than Mr. Connolly’s in the bunch. However, there were some that we omitted because we could not definitely identify the brand on them.

Q. So that there were other cattle. How many head then would you say were grazing up on that particular allotment?

A. I couldn't say. It all depends on the particular bunch of cattle.

Q. You made no count of these particular cattle grazing at that time?

A. We presumed that they were——

Q. Just answer my question. You made no count?

A. No, we just skipped those cattle there, we could not identify the brand.

Q. Did you count any other cattle than Mr. Connolly's cattle on those occasions?

A. Not at that time, no."

On page 2 of appellee's brief, and as included in alleged omissions of evidence by appellant appearing at pages 146 and 147 of the record, reference is made to a conversation between Witness Stephenson and Brian Connolly at the time of their first meeting. The very evidence claimed to be omitted is expressly referred to and in part quoted between the tenth and twentieth lines on page 32 of appellants' brief.

In paragraph 3 on page 3 of appellee's brief it is stated that Witness Barrett testified that "every day he passed through that area he saw horses and cattle. The horses bore the Connolly brand." Immediately following the foregoing appears the statement: "These cattle belong to both appellants (R. 161)." Referring to the record where Witness Barrett mentioned seeing cattle and horses every day on the Blood allotment, we find that the above statement is not the testimony of the witness (R. 159-161). The witness testified he saw horses and cattle every day for two weeks when he passed through the Blood allotment (R. 159). Asked if he identified any of the

horses the witness said: "On one or two occasions, yes" (R. 160). He then testified that August 13, 1941, was the date he identified 32 head of the horses as bearing the brand PY (Brian Connolly's brand) on the left jaw. On August 8, 1941, (R. p. 158) this witness had seen 25 head of horses on "section eleven, thirty-five, nine" (Blood allotment) but he did not identify same as belonging to anyone (R. 158). Consequently, the appellee's statement that the witness saw horses on the Blood allotment bearing the Connolly brand every day he passed through same is not supported by the record. Neither does the record bear out the statement that these cattle belong to both the Connollys, since the witness identified horses bearing Brian Connolly's brand only. Page 161 of the record refers to a date of October 24th and the 36 head of cattle mentioned were not owned jointly by the Connollys but part only (number not stated) bore Brian Connolly's brand and part only (number not stated) bore Daniel Connolly's brand.

At bottom of page 2 of brief appellee refers to evidence as being omitted by appellant with reference to Connolly cattle, cattle with Dan Connolly brand, and a reference to Sinclair, Ryan and Payne cattle (R. 149-150). Reference to all this evidence is made in appellants' brief. On pages 20 and 21 of appellants' brief the 48 head of horses, made up of one bunch of 20 head and one bunch of 28 head, is discussed. At page 28 of appellants' brief the cattle of others run by Connolly is discussed. The designation of "Ryan cattle" was admitted by the witness

to be a misnomer, that the man's name was "Payne," not "Ryan" (R. 152). However, as to the Sinclair cattle and Payne cattle, they are not involved as they did not run with Connolly cattle until 1942, and none of these cattle is claimed to have been in trespass at any time.

The other alleged omissions are likewise wholly immaterial to a determination of the questions before the court. It clearly appears that no material evidence was omitted from appellants' brief.

2. Argument of Appellee.

On page 6 of appellee's brief a part of the decision of the trial court is quoted apparently with a view to call the attention of the court to the alleged violation of the temporary injunction by Brian Connolly. The evidence upon which the violation of the temporary injunction was based related to the same circumstances stated by Witness Stephenson as to his having on January 16th, 27th and 28th, 1942, seen certain horses and cattle in the area adjoining the land (R. 123, 124). The learned trial judge apparently was of the same opinion at the time of the finding of the violation of the temporary injunction as he held at the time of the trial on the merits that the mere fact that Connolly cattle and horses were seen on other land was sufficient to establish a willful trespass. That very question is now squarely presented to this Court for determination, on the merits of the action. If the decision of the lower court in this cause on the merits is erroneous then the trial court was in error in finding that Brian Connolly violated the temporary injunction.

On page 7 of appellee's brief objection is made that appellants' statement that the cattle were grazing on unfenced land is contrary to the evidence of the witnesses for the government. Government Witness Stephenson testified that his testimony as to various units having fences relates to a time after the commencement of this action and the happening of the alleged trespasses (R. 137 ll. 18-20, R. 138 ll. 7, 8). Government Witness Girard testified that out of all the 320 or 325 units (R. 359) ten only he recalls as being fenced (R. 358, 359). On cross examination he, in effect, admitted that the area on which the cattle of Connolly were seen was not surrounded by fences (R. 361) and that some of the fenced units were fenced only on one side or three sides, and that in 1941 some of this fencing was bound to be down (R. 359-363).

Obviously, land on which the fence is down, or land fenced on one, or two, or three sides only is not enclosed by a fence, and hence we reiterate, upon the testimony of the Government's two witnesses, the cattle of Connolly's were on open unfenced land.

At page 8 of appellee's brief various purported trespasses and dates are enumerated and the numbers of livestock added to make 258 head. Included in this count are 25 horses July 5, 1941, which date should be July 24, 1941, (R. 150 ll. 21-29, R. 162 ll. 8-15). Also included are 25 head horses and 45 cattle, testified to by Barrett, but not identified as either of the Connolly's horses on August 8, 1941, (R. 157 & 158). In this count are included 36 head of cattle, part bearing Brian Connolly brand and part Dan Connolly

brand, but numbers of each not segregated (R. 161).

In appellee's brief, pages 9 and 10, appellants are charged with misquoting Section 179, Title 25 U. S. C., because at the bottom of page 29 of appellants' brief the word "forfeit" is used. By referring to page 29 of our brief it clearly appears the appellants do not purport to quote the statute verbatim. It says the statute "provides substantially" that a person shall forfeit the sum of One Dollar for each animal. Webster's Twentieth Century Dictionary gives the word "forfeit" as a synonym for the word "Penalty," and the definition of the word "forfeit" in the dictionary applies equally to the loss of the One Dollar a head as a penalty under the statute. The objection is one of words and not of substance.

It is evident from pages 10 to 13 of appellee's brief that appellee misconceives the purport of appellants' contention (Appellants' brief pp. 30-32) as to a court of equity refusing to enforce a penalty by way of punishment. Appellee's argument is to the effect that appellants contend damages may not be awarded in an equity action. Such is not our contention. We admit a court of equity may allow damages by way of compensation for an injury, but we say this Court has adopted the rule that equity will not in granting relief enforce a penalty by way of punishment.

On page 11 of appellee's brief it is stated that at the opening of the trial counsel for the Government referred to the penalty statute "without any response of appellants or their counsel." Reluctantly we must say this statement is incorrect. Reference to pages

86 and 87 of the record discloses, immediately following the opening statement, counsel for appellants (R. p. 87) expressly stated he disagreed with the statement made by counsel for the Government.

It is urged by appellee (brief pp. 15-17) that Congress may abrogate a treaty and by the provision quoted from the Wheeler-Howard Act the Treaty of Laramie was abrogated. A reading of the quoted provisions of the Wheeler-Howard Act will not support the contention. It is a familiar and well established rule that before a treaty right will be deemed abrogated it must clearly appear such was the intent of Congress (*Osage Tribe v. U. S.*, 66 Ct. Claims 64, 279 U. S. 811, 73 L. ed. 9).

The act does not take away the right of Indians to graze the reservation lands. It gives authority to the Secretary to make reasonable rules and regulations to restrict their grazing of livestock to the estimated carrying capacity of Indian range units and to promulgate rules and regulations to protect the range from deterioration, and to assure full utilization of the range. The right to make rules concerning an act admits the existence of the right to do the act. Reference to rules, Title 25, Code Federal Regulations, will be later made in discussing that part of appellee's brief devoted to a consideration of such rules.

It is also a well established rule that vested rights acquired under an Indian Treaty or act of Congress may not be destroyed.

Tulee v. Washington,
315 U. S. 681, 86L. ed. 1115,
Shoshone Tribe v. United States,
304 U. S. 111, 82 L. ed. 1213, at 1217-1219,
Choate v. Trapp.
224 U. S. 665, 56 L. ed. 941, at 945-947.

As to ratification of the tribe of the provisions of the Wheeler-Howard Act (Appellee's brief 16, 17), since the act itself does not destroy the grazing rights a ratification of the act by the tribe does not do so.

Furthermore, the Wheeler-Howard Act does not destroy the tribal custom.

Pages 20-23 of appellee's brief discusses the distinction between Indian Lands and public domain and cites the Taylor Grazing Act (page 21 of brief) as definitely destroying the "open range." This does not aid appellee. The provisions of the Taylor Grazing Act expressly exclude from its operation and effect lands in "Indian reservations," national parks and monuments, Alaska and certain other specified lands (48 Stat. 1269, 315-315 m, Title 43 U. S. C.), hence it did not affect grazing rights on the Blackfeet Indian Reservation.

Indian forestry units are not involved in this case.

In attempting to sustain the judgment for the penalty appellee resorts to Sec. 71.21 of Title 25 of Code of Federal Regulations, which provides a penalty of \$1.00 a head for trespassing cattle. The provision for a money penalty was not incorporated in said section as an amendment until March 24, 1942, long after the complaint in the above action was filed and consequently, cannot be applied to the trespasses

complained of in the complaint. The regulation subd. (b) expressly excepts from its operation livestock “exempt from permit.” Thus, under the regulation and under the department’s interpretation of the section as testified to by Witness Stephenson, the appellants were not trespassers (R. 139, ll 4-23).

The provision from the corporate charter quoted at the bottom of page 25 of appellee’s brief merely conforms to the provisions of the Wheeler-Howard Act which does not destroy grazing rights of Indians, but provides for the regulation of the right.

The rules promulgated by the Secretary of the Interior at the time of the alleged trespasses not being applicable to the stray stock of the Connollys will not sustain the judgment for the penalty.

We respectfully submit the trial court’s judgment should be set aside.

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